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THE ALIENATION OF THE DOWRY IN THE ACTS OF BYZANTINE NOTARIES

In post-Justinianic legislation and legal practice, a significant inconsistency can be discerned regarding the alienation of the dowry, since contradictory laws from earlier centuries were maintained in the codifications and other collections of laws of the Middle Byzantine period. According to pre-Justinianic legislation, it was forbidden to sell unassessed dotal properties without the woman's consent, while it was forbidden to put such properties in surety even with her consent. Justinian's constitution of the year 530 (*CJ* 5,13,1,15) however, prohibited the alienation of the dowry by the husband even with the wife's consent. Further, Novel 61, issued seven years later, stipulates that a second consent of the wife was necessary two years after a transaction involving a dotal property.

The alienation of the dowry in Byzantine law and practice has been discussed on the basis of the juridical and judicial sources. The acts of the notaries have been utilized in two studies of A. Christophilopoulos and V. Kravari, who approached the problem from different angles and consequently reached opposing conclusions[1]. Christophilopoulos, studying the judicial decisions (the Peira, the decisions of Chomatianos and those of the patriarchal tribunal of the fourteenth century) together with the evidence of a few notarial documents, concluded that in Byzantium the application of the law regarding the alienation of the dowry was very flexible, and that the Justinianic constitution of the year 530 was not enforced in practice. Rather, it was the pre-Justinianic legislation that was applied, namely, the alienation of the dowry with the wife's consent. He cites seven notarial documents from the thirteenth and the fourteenth centuries and seven from Byzantine Italy, in which the husband and the wife together proceed to the alienation of the dotal properties. Christophilopoulos notes that these transactions are presented as perfectly legal. He also demonstrates that post-Byzantine practice shows a remarkable continuity from the Byzantine centuries. He traces the origin of this practice back to the ancient Greek tradition, according to which the wife had the ownership of the dowry, while the husband had only the usufruct. In several Byzantine judicial decisions also, the wife is considered as the sole owner of the dowry. In contrast, according to Roman law, the husband was the owner of the dowry. Thus, Christophilopoulos concludes that the flexible application of the law regarding the alienation of the dowry in Byzantine practice may be interpreted as an influence of the Greek concept of the wife's ownership of the dowry, or as a need to facilitate the transactions by avoiding the restrictions of the Justinianic legislation.

V. Kravari included the transactions of dotal properties in a more general study on the *res familiaris*, and she reached a socio-economic interpretation. She points to some documents from the monastic archives of Athos in which the wife alone proceeds to the transaction, while the husband simply consents. In other documents, however, the vocabulary used suggests that actu-

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[1] A. Christophilopoulos, "Ἡ ἐκποίησις τῶν προικῴων ἀκινήτων κατὰ τὸ βυζαντινὸν δίκαιον," *Ἀρχεῖον Ἰδιωτικοῦ Δικαίου* 6 (1939), 538-549=*Δίκαιον καὶ Ἱστορία. Μικρὰ Μελετήματα* (Athens, 1973), 186-196; V. Kravari, "Les actes privés des monastères de l'Athos et l'unité du patrimoine familial," in D. Simon, ed., *Eherecht und Familiengut in Antike und Mittelalter* (Munich, 1992), 77-88.

ally the husband was the sole administrator of the family's property. Kravari discerns two factors which might have played a role in this discrepancy: 1. the legal formulation of the document, namely each notary's legal competence; 2. a socio-economic factor, namely division of the husband's and wife's property, is applied only in the transactions of some aristocratic families – but not in all – while in the documents of families of the lower classes, the *res familiaris* appears as belonging to both the husband and the wife. Thus according to Kravari, the documents of transactions from the Athonite monasteries suggest that the members of aristocratic families had an interest in the husband and wife maintaining separate ownership of their property. This was possible by using competent notaries.

In these two studies the use of the notarial deeds was limited to only a small number of documents. Inevitably, the limited information leads to dangerous generalizations. From the documents of transactions from all the areas of the empire, a more complex picture emerges, while a comparison with the indications of the other legal sources could reveal the legal tradition which determined the contradictory approach to the alienation of the dowry in Byzantium.

Apart from the documents in which the transferred property is identified as dotal, there are several other documents of transactions containing incidental references to dowr[2]. While in some deeds it is simply stated that the husband received the dowry[3], in other documents the legal terminology suggests that the husband received the dowry in his wife's name[4]. It is interesting to note that it is only in the will of Eustathios Boilas that it is specified by him, the father, that his daughter had the δεσποτεία of their dotal properties[5]. Other documents reveal that the dowry had been sold during the marriage without the advice of the wife[6], or that a property was bought with dotal money[7], or how the husband compensates his wife for her dowry[8]. Other documents illustrate cases of inheritance or claims of the wife's heirs[9]. In one such document, a widow

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2 Cf. for example: *Actes de Zographou*, ed. W. Regel, E. Kurtz, B. Korablev, *VV* 13 (1907), Priloženie 1, no. 28 11. 20-22, 58-61 (1330); Arkadios Batopedinos, *Γρηγόριος ὁ Παλαμᾶς* 3 (1919), p. 338 11. 10-11; *Actes de Chilandar*. I. *Actes grecs*, ed. L. Petit and B. Korablev, *VV* 17 (1911) Priloženie 1 no. 21 11. 9, 14 (1304); no. 105 11. 19-20 (1325); no. 118 11. 35-39 (1329).

3 Cf. G. I. Theocharides, *Μία διαθήκη καὶ μία δίκη βυζαντινή. 'Ανέκδοτα βατοπεδινὰ ἔγγραφα τοῦ ΙΔ' αἰῶνος περὶ τῆς μονῆς Προδρόμου Βεροίας* (Thessalonike, 1962): 20-21 (l. 64), παρεδόθη πρός με διὰ γυναικείας προικός; idem, "Eine Vermächtnisurkunde des Grossstratopedarchen Demetrios Tzamblakon," *Polychronion, Festschr. F. Dölger* (Heidelberg 1966), 489-490 (11. 17-18); ἅτινα μοὶ δέδωκεν ὁ πενθερός μου; *Actes de Chilandar* no. 27 l. 43 (1314); *Actes d'Esphigménous* ed. J. Lefort, (Paris, 1973) no. 9 l. 9 (1301): in this document, while it is clearly stated that the dotal property was given to the son-in-law, both he and his wife consent to her father's sale of a property. With their signatures they might also renounce their pre-emption right as neighbours of the transferred property.

4 *Actes d'Iviron* II. *Du milieu du XIe siècle à 1204*, ed. J. Lefort, N. Oikonomidès, D. Papachryssanthou (Paris, 1990), no. 44 l.8 (εἰς πρόσωπον αὐτῆς; 1090), no. 47 l.4 (παραλαβόντι προσώπῳ ἐμῷ; 1098).

5 P. Lemerle, *Cinq études sur le XIe siècle byzantin* (Paris, 1977), p. 25 ll. 170 - 4. Cf. also *Actes de Lavra III. De 1329 à 1500*, ed. P. Lemerle, A. Guillou, N. Svoronos, D. Papachryssanthou (Paris, 1979), p. 137.

6 *Actes Chilandar* no. 27 11. 78-80, 82-83 (1314); 155 ll. 24-36 (a father donated a dotal property to Chilandar and according to a patriarchal decision it was restored to his son; cf. also Basilica 29, 1, 30); D. Simon and Sp. Troianos, "Dreizehn Geschäftsformulare," *Fontes Minores* II (Frankfurt, 1977), p. 277 (no. 8 ll. 8-9); G. Ferrari, "Formulari notarili inediti dell' età bizantina," *Bullettino dell' Istituto storico italiano* 33 (1912) = *Scritti Giuridici* I (Milan, 1953), p. 355 (no. 37 l. 15).

7 Fr. Miklosich, J. Müller, *Acta et diplomata graeca medii aevi sacra et profana* (Vienna, 1877-1898), 4, p. 161. 34.

8 *Actes Chilandar* no. 27 ll. 80 ff. (1314); no. 97 l. 27 (1324); *Actes de Xénophon*, ed. D. Papachryssanthou (Paris, 1986) no. 24 l. 2 (on *antichresis* in this document cf. Harmenopoulos, ed. C. G. Pitsakes Γ 3,113 n. 2); Theocharides, "Vermächtnisurkunde," ll. 22-23; Miklosich, Müller, 4, p. 126 ll. 7-12. Cf. also *Actes de Docheiariou*, ed. N. Oikonomidès (Paris, 1984), no. 4 l. 87 (1117).

9 Miklosich, Müller, 4, p. 140 ll. 17-20 (1291); *Actes de Lavra II. De 1204 à 1328*, ed. P. Lemerle, A. Guillou, N. Svoronos, D. Papachryssanthou (Paris, 1977), no. 98 ll.3, 18-20 (1304): after his wife's death the husband receives 1/3 of her dowry (cf. K. E. Zachariae von Lingenthal, *Geschichte des griechisch-römischen Rechts*, 3rd ed. (Berlin, 1892), 93 ff.; R. Macrides, "Dowry and Inheritance in the Late Period: Some Cases from the Patriarchal Register," in: Simon, *op. cit.*, pp. 89-98; N. P. Matses, *Τὸ οἰκογενειακὸν δίκαιον κατὰ τὴν νομολογίαν τοῦ Πατριαρχείου Κωνσταντινουπόλεως τῶν ἐτῶν* 1315-1401, (Athens, 1962), 80 f; *Actes Chilandar* no. 27 ll. 41-47 (1314); no. 59 (1321); *Actes de Xéropotamou*, ed. J. Bompaire (Paris, 1964), no. 26 ll. 20-21, 77 (1349).

donated her dowry to the monastery of Lembos. It is stated that she was the owner and thus she decided about this transaction with the consent (μετὰ καὶ βουλῆς καὶ συναινέσεως) of her children[10]. The document drawn on behalf of both the mother and her children is signed by all. In another document the donor binds his heirs not to claim the donated property as parental, for they had received the amount of dowry stipulated by law[11].

The known documents of transactions in which a dotal property was sold are the following:

1. Sale by Eudokia, wife of protospatharios Stephanos Rasopoles and daughter of patrikios Gregory Bourion, to the monastery of Docheiariou (1112. Thessalonike)[12].

2. Sale by a couple with their children to the monastery of Theotokos Lembiotissa (sine anno. Smyrna)[13].

3. Sale by Basil Gabalas and his wife, Kale Alethine, daughter of primmikerios George Prootas to the monastery of Saint John Theologos in Patmos (1216. Ephesos)[14].

4. Sale by a couple to the monastery of Theotokos of Lembos (1232. Smyrna)[15].

5. Sale by the *doulos* of the emperor, John Rabdokanakes, his wife and his mother-in-law to the monastery of Lembos (1236. Smyrna)[16].

6. Sale by the sebastos John Amaseianos, his wife Eudokia and their children (1273)[17].

7. Sale by Theodote (1327. Thessalonike)[18].

8. Sale by a family to a monastery (1332. Hierissos)[19].

9. Donation by Anna Tornikina in favour of the megas stratopedarches Alexios and the megas primmikerios John for the Pantocrator monastery (1358. Constantinople)[20].

10. Sale by the megale domestikissa Anna Kantakouzene Palaiologina to the monastery of Docheiariou (1373.Thessalonike)[21].

11. Donation by the couple Sanianoi in favour of the monastery of Hodegoi (1390. Constantinople)[22].

12. Donation by John Tzakaropoulos in favour of the monastery of Vazelon (1440. Area of Trebizond)[23].

Incidental references in other sources show that in other documents of transactions the transferred property was dotal, but it is not mentioned as such. Thus for example, in a donation by the *doulos* of the emperor, George Kaloeidas, signed also by his wife and her mother, the donated property is mentioned as owned by the couple (1234-9)[24]. But in a later imperial *prostagma* referring to this transaction, it is stated that the said property was part of her dowry (ἀπὸ γυναικείας αὐτοῦ προικός)[25]. Another document of sale of a dotal property from the

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[10] Miklosich, Müller, 4, p. 169 ll. 21-23.

[11] *Actes d'Iviron*, I. *Des origines au milieu du XIe siècle*, ed. J. Lefort, N. Oikonomidès, D. Papachryssanthou (Paris, 1985), no. 16 ll. 38-39 (1010). Cf. also Macrides, 96.

[12] *Actes de Docheiariou* no. 3. Cf. Kravari, pp. 79-80.

[13] Miklosich, Müller, 4, pp. 133-34.

[14] Ibid., 6, pp. 174 -76.

[15] Ibid., 4, pp. 134-35.

[16] Ibid., pp. 192-94.

[17] *Actes d'Iviron III. De 1204 à 1328*, ed. J. Lefort, N. Oikonomidès, D. Papachryssanthou, V. Kravari avec la collaboration d'Hélène Métrévéli (Paris, 1994), no. 61.

[18] On this document from Vatopedi, not yet published, cf. ibid., p. 80.

[19] *Actes de Chilandar*, no. 121. Cf. Kravari, p. 86.

[20] *Actes de Saint-Pantéléèmôn*, ed. P. Lemerle, G. Dagron, S. Cirković (Paris, 1982) no. 12. Cf. Kravari, pp,. 81-82.

[21] *Actes de Docheiariou*, no. 42. Cf. Kravari, p. 83.

[22] A. Failler, "Une donation des époux Sanianoi au monastère des Hodègoi," *REB* 34 (1976), 111-117.

[23] Ф. Успенский, В. Бенешевич, Вазелонские акты. Материалы для истории крестьянского и монастырского землевладения в Византии 13-14 веков (Ленинград 1927) № 153.

[24] Miklosich, Müller, 4, p. 32-33.

[25] Ibid., p. 34.

archives of the same monastery, shows how uncertain the evidence from these sources is: since the document is signed only by the mother and her two sons, we may presume that she was a widow[26]. The use of some technical terms is equally uncertain. While in the legal sources the term προίξ is clearly distinguished from the πρὸ γάμου δωρεάν, in other sources it often designates the man's marriage portion, thus προίξ was often given to a son[27]. One may also suggest that properties designated as γονικόν in the documents of private transactions were eventually dotal[28].

From the twelve documents in which dotal properties were alienated during the marriage, only in four of them do women appear as sole owners and proceed alone in the transactions (our nos. 1, 7, 9 and 10). These are all aristocratic women and the documents were drafted in Thessalonike and in Constantinople. Their husbands only consent with their signature. In the nos. 9 and 10, the children also consent. In the first of these transactions the husband of the vendor offers his warranty to the buyer in case his wife contests the sale, since the property was dotal, by placing his personal property as surety (ll. 66-69). Transaction no. 10 reveals a significant inconsistency in the legal formulation of the ownership of the dowry: while the document is drafted in the name of the woman, and states that the property belonged to her from her ancestors, the text also refers to the husband as co-owner of the dotal property (κατείχετο παρ' ἡμῶν...καὶ ἀποκαθίσταται πρὸς ἡμᾶς ἡ τούτου δεσποτεία καὶ κυριότης: 11. 14-15, 20-21 ff.). The same document reveals that the negotiations with the monastery were handled by the husband; he later informed his wife of his initiative, and she consented to the sale of her property[29]. The same document refers to an earlier sale of a mill of a *paroikos* in the above dotal estate, which the husband sold to the monastery of Vatopedi. Anna Kantakouzene admits that although she had signed the deed of sale, she consented to the transaction because she had been deceived, for she had not been taught (διδαχθεῖσα), as in the present transaction (l. 53), the law which forbids the sale of the dowry[30]. Διδασκαλία νόμου, which actually offered a warranty to the party that benefited from the transaction that the woman would not contest it, is also mentioned in the no. 9 (ll.28-30) of our list.

Only two of the transactions in our list justify the sale of the dotal property. According to no. 10, the estate was not productive any more and the couple had been unable to bring it back to its original shape (ll. 22-23). No. 1 on our list, however, is unique in our sources. Due to the political circumstances of the time and the serious economic difficulties of the family, the vendor was forced to sell her dotal property to feed her children. But because the property was part of her dowry, she was unable to find anyone interested in buying it (ll. 9-10, 32). Thus she addressed a request to the *praitor* and *doux* of Thessalonike. In her *deesis* she explains the financial difficulties of her family (ll. 16-21). The civil authorities recognized the reasons she presented as perfectly legal (there is a reference to the law of the Basilica 28, 8, 20)[31], that her husband had no income (ἄπορος ἐστὶ τελείως: ll. 29-30) and they granted her permission to sell her property (ll. 13-30). This procedure, which remains unique in our sources, may be explained as a way devised to circumvent the law: in

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26 Ibid., p. 135-6, (1281).

27 Cf. for example, Simon, Troianos, "Dreizehn Geschäftsformulare, " p. 276 (no. VII ll. 8-9). Cf. also Macrides, p. 94.

28 Cf. for example in: *Actes de Docheiariou*, no. 3, the property mentioned either as dotal, or simply as γονικόν (11.41, 51), while further both terms are combined ἀπὸ γονικῆς κληρονομίας διὰ γαμικοῦ συμφώνου (1. 52); **Вазелон**. no. 153 l. 2: τοῦ γονικοῦ μου τὸ γυναίκειόν μου τὸ προικέον μου; *Actes de Chilandar*, no. 21ll. 9,14 (γονικοπροικιμαίαν). Cf. also the observation of J. Beaucamp, "L'Egypte byzantine: biens des parents, biens du couple?", in Simon, *Eherecht*, p. 76 that in the transactions on Byzantine papyri there is very little reference to dotal property.

29 Similar conclusion by Beaucamp from the papyri: ibid., p. 75.

30 On the διδασκαλία νόμου of women cf. 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), 81-82.

31 Cf. *Actes de Docheiariou*, pp. 61 and 64.

the warranty of the husband, which follows the deed of sale (ll. 66-69), he places his personal property, explicitly referred to, as surety. Obviously the *protospatharios* Stephanos Rasopoles was not ἄπορος as was stated in the decision of the *praitor* and *doux* of Thessalonike. This perhaps explains why it was so difficult to find a buyer. An additional warranty to the buyer was offered by a second notary who had been invited by the couple to interpret the deed to them.

In all the other documents of our list, except for no. 12, both husband and wife sign the deed and both proceed to the transaction, appearing thus as co-owners. Co-ownership of the dotal property is, however, explicit in nos. 3, 5, 6, 8)[32]. In two of our documents, although the couple proceeds together in the transaction, it is stated that the dotal property belongs to the wife: nos. 4 and 11[33], while in our no. 2 the property is designated in both ways, first as belonging to the couple and secondly as owned by the wife[34]. It is only in one document, our no. 12, that the husband acts without the consent of his wife; he alone signs the document which is drafted in his name. He donates the dotal property for the salvation of his and his wife's souls (ll.6-7).

The evidence of these documents of private transactions suggests that Byzantine notaries dealt with the alienation of the dowry inconsistently.

In the majority of cases that we know of, dotal properties were alienated by the couple jointly. The transactions are presented as perfectly legal. Only in the first document of our list is the alienation of the dotal property justified according to the law, while the διδασκαλία νόμου renouncing the woman's right to cancel transactions involving her dowry, is applied only in two transactions (nos. 9 and 10). In none of our documents are the dowries involved specified as assessed or not at the time that the marriage contract was signed[35].

Regarding the ownership of the dowry, our documents show that only in the four deeds of aristocratic women from Thessalonike and Constantinople do women appear as sole owners of their properties. A socio-economic factor, as suggested by Kravari, cannot satisfactorily explain this phenomenon, since in other transactions of aristocratic women the couple proceeds jointly in the alienation of the woman's dowry as co-owners (nos. 3, 5, 6, from Asia Minor and Macedonia). It seems to me that a local practice as described in a *scholion* of Harmenopoulos (A, 13, 20)[36] may explain this legal formulation in deeds involving dotal properties from Thessalonike and Constantinople: οὗτος ἐξ ἔθους πολιτεύεται τοῦ γάμου συνεστῶτος ἐὰν γυνὴ πωλήσῃ προικιμαῖον αὐτῆς κτῆμα συναινοῦντος καὶ τοῦ ἀνδρός αὐτῆς καὶ μετ' αὐτὴν προτάσσοντος, ἢ δι' ὑπογραφῆς ἢ διὰ σιγνογραφίας ... καὶ προβῇ μὲν τό συμβόλαιον ἐκ προσώπου ταύτης συναινοῦντος καὶ τοῦ ἀνδρός...[37] This practice, however, was far from being generalized, since it is not found in our nos. 6 and 11 from the same areas of the empire. Particularly document no. 11, which was drawn in Constantinople at the time when the patriarchal tribunal was very sensitive to questions related to the alienation of the dowry and imposed the διδασκαλία νόμου on women[38].

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[32] Miklosich, Müller 6, p. 174 l. 31-2: καὶ εἰς προῖκαν ἡμῖν περιελθούσης παρὰ τῶν γονέων ἡμῶν (no. 3); 4, p. 192 ll. 21-23: ἀπὸ προικὸς περιελθόντα ἡμῖν τοῖς ὁμοζύγοις ἐξ ἀγορᾶς περιελθόντα τοὺς αὐθέντας καὶ γονεῖς ἡμῶν, ἐμοῦ δὲ τοῦ Ῥαβδοκανάκη πενθεροῦ; 193 l.2: ἐπροικίσθησαν ἡμῖν; ll. 26-27: ἡμεῖς οἱ ὁμόζυγοι ἀπερικόπως καὶ ἐνεμόμεθα ὡς δεσπόται αὐτῶν (no. 5); *Actes d'Iviron*: χωραφιαία μας γῆ ... ἣν καὶ ἐν τῷ προικοσυμβολαίῳ ἡμῶν ἐγγράφῳ κατέχομεν (Kravari, p. 84); *Actes de Chilandar*, no. 121 l.16: τὸ ἐκ προικὸς ἡμῶν χωράφιον (no. 8).

[33] Miklosich, Müller 4, p. 134 ll. 31-32: τὰ περιελθόντα μοι ἐκ προικός μου (no. 4); Failler, p. 117 ll. 19-20: τὰ προικὸς χάριν περιελθόντα ἐμοὶ τῇ Σαννιανίνῃ (no. 11).

[34] Miklosich, Müller, 4, p. 133 l. 33: τὰ ἐλαϊκὰ ἡμῶν δένδρα, ἅπερ ἔχω ἐκ προικός μου.

[35] The only known document in which the dowry is defined as non-assessed is a marriage contract: Simon-Troianos, "Dreizehn Geschäftsformulare," p. 292 (no. XII ll. 9-12).

[36] Ed. Pitsakes, p. 79.

[37] Cf. Zachariae, p. 100 and n. 272; Christophilopoulos, pp. 190-91.

[38] Cf. H. Saradi-Mendelovici, p. 82.

There is also another factor to be considered. Such legal formulations, justifying the alienation of the dowry according to the law and having aristocratic women responsible for the transaction, aimed at securing the buyer from possible contests. It is also likely that such contests had good chances to succeed, since the relatives of aristocratic women could influence the outcome of judicial decisions in their favour. This could explain why, particularly in transactions of aristocratic women, the legal formulation of the transaction offered additional warranty to the buyer.

One final observation should be added. The cases in which the couple sells a dotal property jointly evoke a historical reality, namely that the husband was the administrator of his wife's personal property[39], recognized also by legislation[40]. Thus the dowry is part of the *res familiaris*[41] during the marriage, particularly protected by the law due to women's insecure financial situation.

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[39] Cf. Beaucamp, p. 75, Kravari, pp. 79 and 85.

[40] Basilica 29, 1, 3; 29, 1, 52.

[41] On the *res familiaris* from the papyri cf. the observations of Beaucamp and particularly A. Christophilopoulos, Σχέσεις γονέων καὶ τέκνων κατὰ τὸ βυζαντινὸν δίκαιον (Athens, 1946), 140-156 = "Ἡ συζυγικὴ κοινοκτημοσύνη κατὰ τὸ δίκαιον τῶν παπύρων καὶ οἱ Πέρσαι τῆς ἐπιγονῆς," Μικρὰ Μελετήματα, pp. 94-105.