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A broken marriage promise and Justinian as a lover of chastity : on Novela 74 and P. Cairo Masp. I 67092 (AD 553)

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Jakub Urbanik

**A BROKEN MARRIAGE PROMISE
AND JUSTINIAN AS A LOVER OF CHASTITY**

ON NOVELA 74 AND P. CAIR. MASP. I 67092 (553)*

SHORTLY AFTER THE COMPLETION of the great codification, in the year 529, its architect decided to regulate anew the matters concerning the legitimation of the children born out of the wedlock. In the same law, the legislator's attention was turned, somewhat by the way, to the problem of constitution of a legitimate marriage.¹ In an attempt to regulate this matter Justinian decided that the unions contracted among the representa-

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¹ One cannot help noting the discrepancy between the Greek and the Latin title of the statute. While the Latin heading merely refers to the problem of legitimation of children (*R_x quibus modis naturales filii efficiuntur legitimi et sui supra illos modos qui superioribus constitutionibus continentur*), the Greek caption foretells the second aspect of the legislation as well (*περι παιδῶν πῶς χρῆ νοεῖσθαι αὐτοὺς γνησίους ἢ νόθους. Καὶ περὶ ἀπρόικων συνοικεσίων*).

tives of the class of the highest officials up to the level of *illustres*, acquired validity only if they were accompanied by a dowry and bridal gifts, the other, still high ranking persons, yet less than senators were to execute a specific deed of marriage with the aid of a *defensor ecclesiae*.² For the first time in the history of Roman marriage there was a consistent legislative effort directly aimed at departing from the legal uncertainty that branded – not without a reason – the creation and persistence of legitimate unions in classical Roman Law.³ This study is intended to show what kind of situations may have triggered the Emperor's initiative, quite understandable in the legal framework of the Roman marriage. This socio-legal figure, as designed by the classical jurisprudence, was devoid of any formal requirement, and its existence depended merely on the will of the spouses. In what follows, I will, having recalled the figure of marriage in Roman classical law, first report the content of the relevant sections of *Nov. 74*, and subsequently present one of the papyri from the Archives of Dioskoros, a petition of a woman called Aurelia Eirene requesting an arrest of her unfaithful partner.

1. NOVELA 74: THE RATIONALE

In the introduction to Chapter Four of the constitution the Emperor presents his reasons to put forward the new normative which aim was to introduce entirely novel means regulating the creation of marriage:

² Cf. *Nov. 74.4.1*, described *infra*, pp. 132–134, and A. ARJAVA, *Women and Law in Late Antiquity*, Oxford 1996, p. 206. The second group of the subjects of the law is somewhat obscure. For the hierarchy of the highest ranks in the Later Roman Empire and under Justinian, see A. H. M. JONES, *The Later Roman Empire 284–602. A Social Economic and Administrative Survey* II, Oxford 1964, pp. 527–535, and on certain ambiguity of the honorific titles in the times preceding Justinian, see also n. 12 (vol. III, p. 151).

³ Some scholars suggest that this moment actually happened before, as early as in 428 in the East (*C. Tb. 3.7.3*) and 458 in the West (*Nov. Maior. 6.9*) – cf. ARJAVA, *Women* (cit. n. 2), p. 206, n. 5, and L. ANNÉ, 'La conclusion du mariage dans la tradition et le droit de l'Église latine jusqu'au VI^e siècle', *Ephemerides Theologicae Lovanenses* 11 (1935), pp. 513–550, at 514–515. For reasons for which I do not share this view, see *Postilla*, pp. 148–151.

Nov. 74.4 pr.: Illud quoque melius arbitramur constituere competenter, quod ex plurimo causarum experimento cognovimus; multae quidem et continuae lites nuntiatae nostrae maiestati ad opus nos deduxerunt legis. Quia enim et antiquis promulgatum est legibus et a nobis ipsis sunt haec eadem constituta, ut nuptiae et extra dotalia documenta ex solo affecta valeant et ratae sint, sed falsatis contractibus nostra ex hoc est completa respublica (nam introeunt testes sine periculo mentientes, quia vir vocabat dominam cohaerentem et istum illa similiter nominabat, et sic eis finguntur matrimonia non pro veritate confecta), hoc aestimavimus oportere secundum naturales definire leges. Novimus etenim et castitatis sumus amatores et haec nostris sancimus subiectis: sed nihil est furore amoris vehementius, quem retinere philosophiae est perfectae, monentis et insipientem atque inhaerentem concupiscentiam refrenantis; ut hi qui hoc tali detinentur <quo> se abstinebunt sermone ad eas quas amant, quem eis non per blandimenta conferunt? Denique in tantum etiam ante nos legislatores tales scierunt animorum affectus, ut etiam donationes constante matrimonio prohiberent, ut non concupiscentiae magnitudine victi laterent paulatim coniuges semet ipsos sua privare substantia. Haec ergo casta lege sancire bene se habere credidimus.

We also better consider that what we have learnt from the experience of a number of cases should be more competently regulated: since numerous and continuous legal controversies communicated to Our Majesty have brought Us to this legislative undertaking. Hitherto it yet has been regulated by ancient laws – and we have confirmed the same principle, too – that marriages should be valid and ratified solely by affection and without (necessity) of dotal documents, yet our State has been filled since then by false agreements (as there appear witnesses who lie without any risk that a man would refer to a woman united with him as ‘a mistress’ and she would similarly call him; and in this way they feign marriages which have not been truly contracted), we have deemed that it should be defined according to the natural laws. And so, being lovers of chastity, we have learnt what follows, and we order it to our subjects. There is nothing more intense than the folly of love,⁴ to restrain it is a thing of perfect philosophy which admonishes and brings in desire and to which it is inherent is to control it, so that these who are possessed by such would abstain from language addressed to those whom they love, which is used to soften them. Finally, the legislators that preceded us had known that the affection of spirits is so great, that they would even forbid gifts during marriage, so the spouses, overwhelmed

⁴ The Greek text uses even a more salacious expression *μανία ἐρωτική* – erotic lunacy.

by greatness of desire would not deprive each other of the property little by little. And so we believe that the following ought to be sanctioned by a chaste law.

The moralistic sauce in which the regulation is bathed, the image of the virtue of perfect philosophy which keeps at cross human desires, fit well the picture of Justinian as the moralising lawgiver which the sources transmit. Suffice to recall his struggle to put down prostitution and pro-curation⁵ or his final attempt to forbid divorce.

Yet, a student of Roman law will understand immediately the broader, legal and not so-morally-preaching, context of the Justinianic decision, which only indirectly shines through the cited text. The classical law shaped marriage as a reality based merely on the mutual will of the spouses (*affectio maritalis*).⁶ The marriage lasted as long as there was consent of either of the consorts to remain married. In other words, the want of the consent

⁵ Cf. *Nov.* 14 (535), banning pro-curation, as well as two contrasting accounts by Pro-copius, one mocking the imperial struggle of chastity and the other praising it (*Arc.* 17 and *Aed.* I 9, respectively). On the presumed inspiration of Theodora for *Nov.* 14, see J. E. SPRUIT, 'L'influence de Théodora sur la législation de Justinian', *RIDA* 24 (1977), pp. 389-421, at 406-410.

⁶ On the subject there exists copious literature, the obvious point of reference are always works by E. VOLTERRA, with the epoch-making, *La conception du mariage d'après les juristes romains*, Padua 1940 [= *Scritti giuridici* II, Naples 1991], and his summa *Lezioni di diritto romano. Il matrimonio romano*, Rome 1961 (2nd ed.). VOLTERRA's view, even if sometimes perhaps too radical, has been generally accepted, notwithstanding the resistance, quite unconvincing, of a few authors postulating that the initial consent was the fundament of Roman marriage: J. HUBER, *Die Ehekonsens im römischen Recht*, Rome 1977, and O. ROBLEDA, *El matrimonio en derecho romano*, Rome 1970. Most recently R. ASTOLFI, *Il matrimonio nel diritto romano classico*, Padua 2006, tried – in somewhat artificial way – to combine the initial consent hypothesis with the theory of the continuous one. In his view the Roman marriage was to be made through the initial consent of the spouses, but its duration depended on the continuous will of the spouses to remain married (cf. *ibidem*, pp. 26-43 and 44-45). This idea seems to force the interpretation of Gaius' comparison between marriage and mortgage (both created by the consent alone) in D. 20.1.4 = D. 22.4.4. From the abundant English literature the Reader may be referred to F. SCHULZ's handbook, *Classical Roman Law*, Oxford 1950, pp. 103-141 (chapter IV: 'Husband and wife') and the more recent book by Susan TREGGIARI, *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian*, Oxford 1991, *passim*, but especially pp. 54-57.

in either of the spouses resulted in an immediate divorce without necessity of any further formalities. This doctrine remained in force throughout the whole post-classical period, notwithstanding some attempts in the imperial legislation to limit and penalise unilateral ruptures of marriage, starting with the (in)famous constitution of Constantine the Great of 324, *C. Th.* 3.16.1.⁷ It is worth noticing that even Justinian himself in many instances, among others in the constitution under examination here, stresses his conviction that marriage in general should be based on the consent of the spouses alone.⁸ It seems that an uninterrupted *affectio*

⁷ Even if a unilateral divorce without a legitimate (just) cause became illicit and hence punished, it was still valid. VOLTERRA's assumption therefore that the Constantine's legislation marks the change from the continuous to the initial consent as the fundament of the Roman marriage seems to have been too far-fetched (cf. VOLTERRA, *La conception* [cit. n. 6], p. 59, and J. URBANIK, 'La repressione constantiniana dei divorzi: La libertà dei matrimoni trafitta con una forcina' [in:] *Fides. Humanitas. Ius. Studi in onore di Luigi Labruna VIII*, Naples 2007, pp. 5705–5726, at 5711–5712). There is abundant literature on the changes in the imperial law concerning divorce and especially its possible Christian inspiration. For the purpose of the present article it shall suffice to recall J. GAUDEMET, *Droit romain et principes canoniques en matière de mariage au Bas Empire*, [in:] *Studi in memoria di Emilio Arbertario II*, Milan 1953, pp. 171–196 [= *Études de droit romain III*, Naples 1979, pp. 165–188]; Judith EVANS-GRUBBS, *Law and Family in the Late Antiquity. The Emperor Constantine's Marriage Legislation*, Oxford 1995 – the main theses of this book are to be found in EADEM, 'Constantine and imperial legislation on family', [in:] J. HARRIES & I. WOOD (eds.), *The Theodosian Code. Studies in the Imperial Law of Late Antiquity*, London 1993, pp. 127–130; the legal practice was confronted with the Christian teaching by R. S. BAGNALL, 'Church, state and divorce in Late Roman Egypt', [in:] K.-L. SELING & R. SOMERVILLE (eds.), *Florilegium Columbianum: Essays in Honor of Paul Oskar Kristeller*, New York 1987, pp. 41–61 (now in *Later Roman Egypt: Society, Religion, Economy and Administration*, Aldershot 2003, chapter IV); see also E. VOLTERRA, 'Ancora sulla legislazione imperiale in tema di divorzio', [in:] *Studi A. Biscardi V*, Milan 1984, pp. 199–206 [= *Scritti giuridici VI*, Naples 1994, pp. 521–206]. Most recently on the subject: M. MEMMER, 'Die Ehescheidung im 4. und 5. Jahrhundert n. Chr.', [in:] M. J. SCHERMAIR, J. M. RAINER, & L. C. WINKEL (eds.), *Iurisprudentia universalis. Fs. Th. Mayer-Maly*, Cologne 2002, pp. 489–510.

The legal practice of divorce and the application of the imperial norms were the subjects of A. MERKLEIN, *Das Ehescheidungsrecht nach den Papyri der byzantinischen Zeit* (Diss. Erlangen, Nuremberg 1967, *passim*, part. pp. 68–79, and, more recently, of the ground-breaking *opus* by Joëlle BEAUCAMP, *Le statut de la femme à Byzance (4^e–7^e siècle)*, I: *Le droit impérial*, Paris 1990, § 15 & 22, especially pp. 172–173, 221–223, & 237–238; II: *Les pratiques sociales*, Paris 1992, § 33 & 36.

⁸ See *Nov.* 74.4 *pr.*, cited above ('marriages should be valid and ratified solely by affectio')

maritalis may have ceased to be the principal factor of creation of marriage only with *Novel* 134 of 556. I tried to prove it elsewhere: the Greek version of this law, having listed admissible cases for a unilateral divorce, declared void any divorce undertaken against the law and expressly banned consensual ruptures.⁹

This classical paradigm of marriage brought about the state of legal uncertainty as far as the status of persons was concerned.¹⁰ It may even have happened that the other spouse – whose notification of the undertaken divorce was by no mean mandatory for the validity of the dissolution of marriage¹¹ – could not know whether he or she was still married or not. This uncertainty was only partially moderated by the formation of a presumption of marriage in case of cohabitation of a free woman and a man (termed as ‘excellent law’ by a Byzantine scholiast living probably

tion and without [necessity] of dotal documents’). The earlier standing is upheld throughout the Justinianic Codification (see, most emblematically, C. 5.17.11 *pr.*: ... non enim dotibus, sed adfectu matrimonia contrahuntur – ‘indeed are marriages not contracted through dowries but through affection’ [533]), and in the Emperor’s first general reform of the marriage law, *Nov.* 22 (536). See further J. URBANIK, ‘Marriage and divorce in the Late Antique legal practice and legislation’, [in:] E. OSABA (ed.), *Derecho, Cultura y Sociedad en la Antigüedad Tardía*, Bilbao (forthcoming), § II.1.

⁹ See URBANIK, ‘La repressione’ (cit. n. 7), p. 5712 with n. 13. *Nov.* 136.11 *pr.*: *Κελεύομεν παρ’ ἐκείνας τὰς αἰτίας μηδενὶ τρόπῳ ῥεπούδια γίνεσθαι ἢ ἐρρώσθαι γινόμενα ἢ κατὰ συναίνεσιν τοὺς γάμους διαλύειν καὶ συγχωρεῖν ἀλλήλοις τὰ ἀμαρτήματα.* – ‘and we order that divorces are neither to be made in any other way except for these reasons (i.e. listed in the preceding paragraphs – *f.U.*), nor to be valid if made, nor that marriages are to be dissolved by consent nor to agree between each other (the spouses – *f.U.*) on the faults.’

¹⁰ Cf., just for the sake of example, problems reported in D. 24.1.64 (Iavolenus); D. 23.2.33 (Marcellus); D. 24.2.3 (Paulus), where after a unilateral divorce (or desertion) the spouses get back together.

¹¹ Cf. C. 5.17.6: Diocletianus et Maximianus AA. et CC. Phoebō: Licet repudii libellus non fuerit traditus vel cognitus marito, dissolvitur matrimonium. D. XVIII k. Ian. Nicomediae CC. consulibus (15 December 294). – ‘Even if the deed of repudial has not been transmitted or accredited to the husband, the marriage is dissolved’. The bizarre interpretation of this fragment in the totally opposed sense suggested by Ernst LEVY and his theory of ‘Empfandsbedürftigkeit’ – the duty of notification of divorce – (*Der Hergang der römischen Ehescheidung*, Weimar 1925, pp. 15, 54–66, and 84–85) based on obviously forced reading in a clearly interpolationistic key has long been criticized and abandoned (cf., *inter alios*, R. YARON, ‘Divortium inter absentes’, *TR* 31 [1963], pp. 54–68, at 56–58).

during the reign of Heraclius)¹² and the introduction of an obligatory letter of repudial, deed of divorce, by the *Theodosian Novel* 12 in 439, a measure

¹² Cf. D. 23.2.24 (Modestinus, *reg.* 1): In liberae mulieris consuetudine non concubinatus, sed nuptiae intellegendae sunt, si non corpore quaestum fecerit. – ‘a companionship of a free woman, should be considered as marriage and not concubinage, unless she has made trade of her body’; and D. 25.7.3 *pr.* (Marcianus, 12 *instit.*): In concubinato potest esse et aliena liberta et ingenua et maxime ea quae obscuro loco nata est vel quaestum corpore fecit. Alioquin si honestae vitae et ingenuam mulierem in concubinatum habere maluerit, sine testatione hoc manifestum faciente non conceditur. Sed necesse est ei vel uxorem eam habere vel hoc recursantem stuprum cum ea committere. (...) – ‘Another’s freed-woman or a freeborn – especially one of low-birth – or someone who makes trade of her body may be (a party) to a concubinage. Moreover, should a man prefer to have a woman of honest life or a free-born in concubinage, he is not allowed to do so without an attested statement that clearly declares it. He shall either take her as wife or, refusing it, he shall commit *stuprum* with her’.

It is worth noticing in the second text that a *testatio*, a statement with witnesses, was recommended to prove the existence of concubinage and not marriage, which evidences further the purely consensual character of the latter. Both texts, among others, show that Antti ARJAVA’s opinion that a Roman man had always a free choice between concubinage and marriage may be a bit far-fetched (cf. *Women* [cit. n. 2], p. 205). For the eligibility as concubine, a vexed question whose solution is based on obviously contradictory sources, see Susan TREGGIARI, ‘Concubinae’, *PBSR* 49 (1981), pp. 59–81, especially pp. 71–77, and T. MCGINN, ‘Concubinage and the *Lex Julia* on adultery’, *TAPhA* 121 (1991), pp. 335–375, especially pp. 347–*fin.* For detailed treatment of the passage of Modestinus, see R. ORESTANO, ‘Sul matrimonio presunto in diritto romano’, [in:] *Atti del Congresso internazionale di diritto romano e di storia del diritto. Verona 27–28–29–IX–1948* III, Milan 1951, pp. 47–65 (not without reservation as to ORESTANO’s final statement on the supposed moral valour of this elocution, p. 65), TREGGIARI, *op. cit.*, pp. 74–75, and MCGINN, *op. cit.*, pp. 363–367, with literature. For commentary to the fragment of Marcianus’ *Handbook*, cf. now MCGINN, *op. cit.*, pp. 359–362, with literature: an excellent overview of the textual problems as well as the interpolationistic hypotheses (one could consult as well, ORESTANO, *op. cit.*, pp. 53–55, with P. BONFANTE, *Corso di diritto romano* I, Rome 1925, p. 236, and TREGGIARI, *op. cit.*, pp. 72–73, all with résumés of the earlier scholarship).

Interestingly, the *scholion* of the so-called Anonymos/Enantiophanus (on this person, see N. VAN DER WAL, ‘Wer war der “Enantiophantes”?’), *TR* 48 [1980], pp. 125–136), explaining B. 28.4.14, the Greek paraphrase of D. 23.2.24, refers to *Nov.* 74 for the cases in which the presumption may be applied and in which it is not needed anymore because of Justinianic regulation: Σημειώσαι νό[μιμον] θαυμαστόν, ὅτι κατὰ πρόληψιν γαμετὴν ἔχειν τις δοκεῖ τὴν συνηθείας αὐτῷ συναπτομένην, ἐν ᾧ ἐλευθέρᾳ ἐστὶν καὶ οὔτε πόρον ἐκ τοῦ οἰκείου ποιεῖται σώματος. ἀνάγνωτι [πάντος] τὴν ὁδ. τὴν μετὰ τὸν Κώδ(ικα) διάτ(αξέων) (SCHELTEMA – HOLWERDA B V 1818). – ‘do note an excellent law that by presumption one

incorporated into the Justinianic legal order with C. 5.17.8.¹³ A thorough discussion of the reasons of such state of affairs is not the matter of the

is regarded to have as spouse the one who has joined him for purpose of habitual intercourse, if she is free and unless she makes trade of her own body. Read above all, 74 of the post-codex constitutions.’ (see also ORESTANO, *op. cit.*, p. 52).

¹³ C. 5.17.8: Imperatores Theodosius, Valentinianus: Consensu licita matrimonia posse contrahi, contracta non nisi misso repudio solvi praecipimus. Solutionem etenim matrimonii difficiliorem debere esse favor imperat liberorum – ‘licit marriages may be contracted by consent, we order that once contracted they may only be dissolved through a deed of divorce. The benefit of children commands that a dissolution of marriage should be more difficult’. The not-so-high number of deeds of divorce post-dating *N. Th.* 12 does not allow any conclusive statement as to the effectiveness. There are merely eleven (or thirteen, if we count in the second copies of two deeds) acts documenting divorce by common consent, moreover most of them come from the same milieu of Dioskoros’ Archives: *P. Cair. Masp.* III 67154 (Antinoopolis, reign of Justinian; see BAGNALL, ‘Church’ [cit. n. 7], p. 56); *P. Cair. Masp.* II 67155 (Antinoopolis, 566–573); *P. Cair. Masp.* II 67153, with its counterpart 67253 (Antinoopolis, 7 May 568); *P. Lond.* v 1712 (Antinoopolis, 15 July 569); *P. Lond.* v 1713, with its other copy *P. Flor.* I 93 = *M. Chr.* 297 (Antinoopolis, 5 September 569); *P. Cair. Masp.* III 67311 (Antinoopolis, 569–570); *BGU* XII 2203 (Hermopolis Magna?, 7 July 571); *P. Cair. Masp.* I 67121 (Aphrodite, 15 September 573); *P. Herm. Rees* 29 (Hermoupolis, 26 July 586); *P. Ness.* III 33 (Nessana, 6th cent.); *P. Colt. Ness.* III 57 (Nessana, 1–17 September 689); and a Coptic, *SB Kopt.* II 934 (Ashmunein, 7th/8th cent.). One singular deed *P. Oxy.* I 129 = *M. Chr.* 296 (533) records a unilateral repudiation, even more curious by the fact that it is the father who sends it on behalf of his daughter, see further my ‘D. 24.2.4: ... Pater tamen eius nuntium mittere posse: l’infusso della volontà del padre sul divorzio dei sottoposti’, [in:] T. DERDA, J. URBANIK, & M. WĘCOWSKI, *Εὐεργεσίας χάριν. Studies Presented to Benedetto Bravo and Ewa Wipszycka by Their Disciples* [= *JJP Supplement Series* 1], Warsaw 2002, pp. 293–336, at 324–325, with literature, where I followed MITTEIS’s interpretation of this deed against the one of the original editors and E. VOLTERRA, ‘Il Pap. Oxryrhynchus 129 e la L. 5 C. *De spons.* 5,1’, *SDHI* 3 (1936), pp. 135–139 [= *Scritti giuridici* I, Naples 1991, pp. 537–542].

There are, however, some more solid indications that may speak in favour of actual application of this law in question. It is, first and foremost, the Latinism *ῥεπουδίου*, commonly denominating the act of divorce in the Byzantine parlance of the papyri. Its earliest occurrence in a petition of a maltreated Christian woman against her (former) husband, *P. Oxy.* I 3581 (Oxyrhynchus, 4th/5th cent.), provides another proof in this matter. The woman, Aurelia Attaina, claims to have sent the repudial in accordance with the imperial law through the *tabularius* of the City (cf. ll. 16–18: *ῥεπουδίου δια ταβουλαρίου προσέπεμψα αὐτῶ δια τοῦ τῆς πόλεως ταβουλαρίου κατὰ τὸν βασιλικὸν νόμον*, cf. BAGNALL, *op. cit.*, p. 43 with n. 7). Finally, another, yet circumstantial argument, may be sought in the fact that the Byzantine divorce settlements would tend to use present tense in describing

present article, it shall suffice to recall the doubtlessly correct intuition of Fritz Schulz that this concept of a legitimate union favoured women, who were granted equal right to divorce with men.¹⁴

Having considered the above, we may now better comprehend the motivations that led Justinian to his reform and to its further reaffirmation in 542 with Chapter Four of *Nov. 117*. A compulsory dotal document was aimed at elimination of any uncertainty as to the character of the unions of Justinian's subjects belonging to the higher classes. The choice of the latter as the addressee of the norm comes with no surprise. The legislator followed the good old tradition of the Roman law-making in marital matters, being only concerned with the morals of the upper classes. This factor well fits the pattern of one of the presumed prototypes of the regulation,¹⁵ namely the notorious constitution, C. 5.4.23, by which Justin I conceded legitimate unions between members of the senatorial class and repentant women who had previously carried out infamous professions (enactment thought to have been passed to allow the marriage between Justinian and Theodora).¹⁶ Validity of their marriage, however, depended on the execution of a dowry document.

The Justinianic regulation and his tirade against false marital unions does not leave us without an ulterior bewilderment. Should we actually believe that people of the highest ranks of the society would dispense of a property arrangement contracting marriage, a business involving impressive financial transfers? One is tempted to think that Justinianic reasoning is a pure invention, that in fact what the emperor did was nothing else but to give

the act of dissolution of marriage, whereas the earlier ones opted for past tense: cf., e.g., *P. Cair. Masp.* II 67153, 7: [τ]όδε τὸ ῥεπούδιον τῆς ἀποζυγῆς τίθ[ε]ται σοὶ καὶ διαπέμπομ[αι]. See further, my 'Introduction' to five papyri relating to divorce [in:] J. KEENAN, J. MANNING, & U. YIFTACH-FIRANKO (eds.), *Law and Society in Greek, Roman and Byzantine Egypt. An Introduction to the Sources* (forthcoming).

¹⁴ See SCHULZ, *Law* (cit. n. 6), p. 103, and earlier, IDEM, *Principles of Roman Law*, Oxford 1936, chapter 'Humanity', especially pp. 193–197. For a more in-depth overview, see URBA-NIK, 'La repressione' (cit. n. 7), pp. 5712–5713 and n. 14.

¹⁵ For the other regulations of the similar tenor and scope, see above, n. 5, and below, *Postilla*.

¹⁶ Cf. Procop., *Arc.* 10.

rank of a legal norm to the omnipresent legal practice.¹⁷ Still, the exact procedure envisaged by the law-giver has left no traces in the legal practice...

2. MARITAL AGREEMENT IN *NOVELA* 74

With *Nov.* 74.4 a dowry and corresponding bridal gifts become compulsory for the validity of marriage of the highest ranks up to the level of *illustres*:

Nov. 74.4.1: In maioribus itaque dignitatibus et quaecumque usque ad nostros est senatores et magnificentissimos illustres neque fieri haec omnino patimur, sed sit omnino et dos et antenuptialis donatio et alia omnia quae honestiora decet nomina.

And by no means shall we tolerate it (marriages by consent alone – *J.U.*) in the highest officials and of whatever (rank) up to our senators and the most magnificent *illustres*, but there shall always be a dowry and bridal gifts and everything that becomes the noble persons.

Constitution of dowry and gifts was certainly accompanied by a written deed – and thus any uncertainty as to the creation of marriage itself was *ipso facto* removed.

In the case of people of lesser rank, yet still honourable, Justinian designed a unique and unprecedented mechanism of execution of the marriage certificates:

Quantum vero in militiis honestioribus et negotiis et omnino professionibus dignioribus est, si voluerint legitime uxori copulari et non facere nuptialia documenta, non sic quomodocumque et sine cautela effuse et sine probatione hoc agatur, sed veniat ad quandam orationis domum et fateatur sanctissimae illius ecclesiae defensori, ille autem adhibens tres aut quattuor exinde reverentissimorum clericorum attestationem conficiat declarantem, quia sub illa indictione illo mense illa die mensis illo nostri imperii anno consule illo venerunt apud eum in illam orationis domum ille et illa et coniuncti sunt alterutri. Et huiusmodi protestationem si quidem accipere vol-

¹⁷ See similar view of ARJAVA, *Women* (cit. n. 2), pp. 205–206.

unt aut ambo convenientes aut alteruter eorum, et hoc agant et subscribant ei et sanctissimae ecclesiae defensor et reliqui tres aut quantoscumque voluerint, non tamen minus trium, litteris hoc significantibus.

And in regards to the officials of the rank of *honestiores* and of all kinds of more dignified professions, if they wish to legally unite with their wives and to dispense of nuptial deeds, it shall not be done in manner soever, immoderately without consideration and without any proof. On the contrary: he shall come to a house of prayer and make it manifest to the defender of this holiest church. And he shall execute in presence of three or four most reverend clerics of this place an attestation that in the so-and-so indiction, in the so-and-so month, on the so-and-so day, in the year so-and-so of our reign and during the consulship of so-and-so, they have come to him to this house of prayer and there they have united with one another. And if they wish to accept this statement, either both of them, or anyone of them, they shall do as above and they and the defender of the holiest church and the remaining three or however many they may wish, yet not less than three, shall sign it with letters indicating it.

The nuptial agreement is to be made by the defender of the church, in a holy place, in front of three (or more) clerical witnesses. Moreover, should the parties not follow the prescribed procedure, the *defensor ecclesiae* was supposed to make a deed himself and deposit it with the acts of the church in question, right in the church treasury.¹⁸

¹⁸ *Nov.* 74.4.2: Sin vero etiam hoc illi non egerint, ille tamen talem reponat chartam venerabilia illius ecclesiae defensor in eiusdem sanctissimae ecclesiae archivis (hoc est ubi venerabilia vasa servantur) praedictas subscriptiones habentem, ut reconditum sit hominibus ex hoc munimen, et non aliter videatur nuptiali affectu eosdem convenisse nisi tale aliquid agatur et omnino ex litteris causa testimonium habeat. His ita gestis et nuptias et ex eis sobolem esse legitimam. Haec autem dicimus, ubi non dotis aut antenuptialis donationis fit documentum. Fidem enim in solis testibus suspectam habentes ad praesentem venimus dispositionem.

‘And if they have not done so, the defender of this church shall deposit the parchment having the above-ordered signatures in the archives of this holiest church (that is where the venerated vases are kept), so it shall be known to every man from this rampant that these two have joined each other through the marital affection, with the testimony of nothing else but indeed of these letters. Having done so, both the marriage and its issue shall be legitimate. And we declare so in cases in which a document should not be made neither for the dowry nor for the bridal gifts. And, being suspicious about the trustworthiness of witnesses only, we have arrived to this disposition.’

No other normative sources document the quasi notarial function of *defensor ecclesiae*, a rather ambiguous figure whose duties are only vaguely described in the legal texts.¹⁹ Neither do we have any proof of such in the legal practice. In the only papyrus that records this office, a very fragmentary *P. Oxy.* xxiv 2419 (6th cent.), the ἐκκλησιέδικος seems to appear in his regular functions, that is as the trial attorney of a church.

At any rate, to my knowledge, the duty to make a marriage deed in a holy place and by a church officer is the first and, perhaps, the only reference, albeit an indirect one, to the Christianisation of marriage in the Justinianic legislation.²⁰ In his recent and vast study devoted to this subject Philip Lyndon Reynolds does not determine when exactly any kind of church solemnity became the compulsory element of Christian marriage. He stresses that ‘in the early Middle Ages, getting married was a process rather than a simple act’ and it consisted of almost equally important elements such as betrothal, benediction (or alternatively veiling of the spouse or / and bridal blessing) and consummation.²¹ Lucien Anné, in turn, underlined that while the benediction itself never became compulsory as part of the wedding procedure, one could trace down in the Roman-Germanic sources the roots of the canonic principle *nullum sine dote fit coniugium*²² built upon pope Leo’s rescript to a question of Rusticus, bishop of

¹⁹ See, e.g., A. STEINWENTER, ‘Aus dem kirchlichen Vermögensrechte der Papyri’, *ZRG KA* 44 (1958), pp. 1–34, at 12, and F. MARTROYE, ‘Les *defensores ecclesiae* aux V^e et VI^e siècles’, *RD* 2 (1923) pp. 597–622.

²⁰ See similar considerations of C. CASTELLO, ‘Lo strumento dotale come prova del matrimonio’, *SDHI* 4 (1938), pp. 208–2224, at 221–224, yet with somewhat ingenious conclusion that Justinian ‘having entrusted the bishops with the guardianship over moral intended also to involve other clerics in his design to make the human law correspond the divine one’.

²¹ Ph. L. REYNOLDS, *Marriage in the Western Church. The Christianization of Marriage during the Patristic and Early Medieval Periods*, Boston – Leiden 2001, part IV: ‘Nuptial Process’, *passim*, and p. 315. Interestingly the three early Western liturgical forms for marriage (Leonine, Gelasian, and Gregorian) are fashioned more as benediction of the bride than the couple or their marriage (see *ibidem*, p. 381).

²² Gratian cites it as part of the collections of canons of the Synod of Arles (524) – *Decretum Gratiani* II 30.5.6: Item ex Concilio Arelatensi, c. 6. Nullum sine dote fiat coniugium; iuxta possibilitatem fiat dos, nec sine publicis nuptiis quisquam nubere vel uxorem ducere prae-

Narbonne. The original inquiry concerned, to cut the long story short, the validity of marriage contracted between persons of unequal status, so the duty of dotation was by no means a general rule.²³ It comes with no surprise therefore, that even if all these elements are thoroughly discussed in the patristic literature, there is, no evidence of any attempt to influence the lay legislation in this respect – and even less to introduce a church-made deed as an element of nuptial procedure. The only evidence of such might be found according to Anné in one obscure passage from Augustine's *Sermons*.²⁴

August., *Sermo* 332, 4: Sufficiant vobis uxores vestrae, quia sufficere vos vultis uxoribus vestris. Non vis ab illa fiat aliquid praeter te: noli facere aliquid praeter ipsam. Tu dominus es, illa ancilla: Deus fecit utrumque. *Sara*, inquit Scriptura, *obsequabatur Abrahae, dominum eum vocans* (1 Pet. 3:6). Verum est; istis tabulis subscripsit episcopus: ancillae vestrae sunt uxores vestrae, domini estis uxorum vestrarum. Sed quando venit ad illud negotium, quo sexus discernitur, et sexus sibi uterque miscetur; *Uxor non habet potestatem corporis sui, sed vir* (1 Cor. 7:4).

Let your wives be enough for you, as you want that you are enough for them. You do not want her to do anything without you: do not want to do anything without her. You are the master, she is the slave: God has created both. Sarah – says the Scripture – ‘obeyed Abraham calling him “master”’ (1 Pet. 3:6). It is true: to these tablets a bishop attaches his signature: your wives are your slave-girls, you are the masters of your wives. And when it comes to this act, which differentiates sexes, the sex is mixed with one another. ‘The wife has not longer power over her body, but the husband’ (1 Cor. 7:4).

sumat. – ‘Similarly from the Synod of Arles, canon 6: no marriage is made without a dowry; dowry is made within (one’s) means, and let no one dare take wife without a public wedding’.

²³ *Epist.* 167, *inquisitio* 4 (PL LIV 1204B–1205A). The response is concisely reported in *Decretum Gratiani* II 32.2.12. Of the same opinion is H. WIELING, ‘*Iniusta Lex Maioran?*’, *RIDA* 38 (1991), pp. 385–420, at 402–403. Cf. as well, ANNÉ, ‘La conclusion du mariage’ (cit. n. 3), pp. 16–17, with sources and literature, and A. LEMAIRE, ‘Origine de la règle *nullum sine dote fiat coniugium*’, [in:] *Mélanges Paul Fournier* [= *Bibliothèque d’Histoire du droit* 1], Paris 1929, pp. 415–444. A critical overview of the problem, with a very sound delimitation of the scope of the original answer of Leo and only its subsequent generalisation is to be found in REYNOLDS, *Marriage* (cit. n. 21), pp. 163–166, cf. as well the literature therein quoted.

²⁴ ANNÉ, ‘La conclusion du mariage’ (cit. n. 3), pp. 24–25.

It is obvious that the preaching of the bishop of Hippo has got purely rhetorical flavour. The apparent ‘content’ of the *tabulae* – the sexual exclusivity in marriage and the subordination of the wife to her husband does not really resemble the surviving contemporary marriage contracts and cannot be taken as a proof of existing legal rule.²⁵ It may – at the most – suggest that a nuptial deed may be signed by a bishop (perhaps together with other witnesses). There is nothing in the passage to suggest – as Anné writes – that the act was read aloud in the church and then signed as a part of the nuptial ceremony.

It seems that the emperor changed his mind a mere four years later, introducing *Nov. 117* and, apparently, revoking the regulations regarding the noble ‘middle-men’ and confirming only the principles referring to the marriage of highest classes up to the *illustres*.²⁶ The text of the law is

²⁵ The subordination clause is fairly typical (cf., e.g., *P. Cair. Masp.* I 67006, 138–140: *ὁμολογεῖ δὲ ἡ [π]ροειρημέ(ν)η εὐγενεστάτῃ νύμφῃ Βικτωρ[ίνῃ] στέργειν τὸ συνοικέσιον καὶ διαγαπᾶν τὸν ἴδιον αὐτῆς ἄν[δρα] ἐν ᾗ πασιν, καὶ οἰκουρεῖν αὐτοῖς . ω ν καὶ τῶν οἴκων [l. οἴκων] καθ. ἡν διὰ το πράττε[σθ]αι δίχα τῆς τοῦ ἀνδρὸς γνώμης . . .* – ‘the above-mentioned noblest virgin Viktorine agrees to cherish the marriage and to love her husband in everything and to stay in the house ... and not to do anything without her husband’s knowledge’ – by the way, this promise sounds particularly similar to the dispositions of *Nov. 117.8.4–6* allowing the husband to divorce the insolent wife, who would dare, without her husband’s permission, spend time with strangers, or bathe with them, or go the theatre or amphitheatre, or even just remain outside the house); other examples: *CPR* I 30, 19–23; *P. Cair. Masp.* III 67340 recto, 43–45; *P. Lond.* v 1711, 35–40; on the other hand, only very early marriage agreements from Ptolemaic Egypt prohibit the husbands to bring other women or boys to the common household or to keep concubines (cf., e.g., *P. Giss.* 2, 19–22 [Krokodilopolis, 173 BC]). Cf., however, *P. Cair. Masp.* I 67006, 135, and *P. Lond.* v 1711 (both from Dioskoros’ papers), in which the husbands promise not to take any other wife, woman, or concubine (see further below, p. 144). On this subject, see, extensively, U. YIFTACH-FIRANKO, *Marriage and Marital Arrangements. A History of the Greek Marriage Document in Egypt. 4th century BCE – 4th century CE*, Munich 2003, pp. 183–195, especially pp. 188–189.

Józef MÉLÈZE MODRZEJEWSKI in an electronic letter has also pointed out a certain abuse of Peter and Augustine in interpreting the way Sarah referred to Abraham as a sign of total subordination, biblical Hebrew uses the same word for ‘husband’ and ‘master’: *adon* (cf., e.g., Gen. 18:12).

²⁶ Cf. ARJAVA, *Women* (cit. n. 2), p. 205, and also BEAUCAMP, *Le statut I* (cit. n. 7), p. 264, n. 10, and pp. 267–268.

a typical example of the Justinianic chancery style, quite ambiguous and somewhat obscure.

Nov. 117.4: Quia vero legem dudum protulimus iubentem aut dotalia fieri documenta aut alias probationes procedere factas apud ecclesiae defensores, per quas nuptias competat confirmari, aut certe sacramenta praebere, in praesenti perspeximus melius disponere ea quae de his pridem sancita sunt. Et propterea iubemus eos qui maximis dignitatibus decorati sunt usque ad illustres non aliter nuptias celebrare nisi dotalia scribantur instrumenta, nisi tamen aliquis antequam mereretur huiusmodi dignitates ex affectu solo duxit uxorem. Tales enim nuptias ante dignitatem factas et post dignitatem legitimos manere praecipimus, et ex his natos legitimos esse filios; postquam vero honorati fuerint aliqui huiusmodi dignitatibus, non aliter ducere uxores nisi cum dotalibus instrumentis. Hanc autem legis subtilitatem concedimus subiectis nostrae reipublicae barbaris, licet dignitatibus huiusmodi decorati sint, ut etiam nudo affectu possint ipsi volentes contrahere nuptias. Reliquos autem omnes praeter eos qui maximis, sicut dictum est, dignitatibus decorati sunt, cuiuslibet sint dignitatis aut militiae aut studii, si quidem voluerint aut potuerint, non prohibemus cum dotalibus instrumentis ducere uxores; si autem etiam hoc non custodierint, et ex solo affectu celebratas nuptias firmas esse sancimus, et ex eis natos legitimos esse filios iubemus.

As we passed a short while ago a law commanding either to make dowry deeds or to proceed with other proofs made by the defenders of the church, by which it is suitable to confirm marriages or to securely give oaths, We intend by the present law to dispose better about these things that were already sanctioned earlier. And above all we order that these who have been distinguished with the highest dignities – up to the level of *illustres* should not celebrate marriages in any other way than by writing dotal deeds, unless someone had taken a wife only through affection before he may have earned his dignities. And so we direct that such marriage made before the dignity should remain legitimate after the dignity, and the children born out of it are legitimate as well. Indeed after they had been honoured with dignities of such kind they (cannot) take wives otherwise but with dotal deeds. We make a concession regarding the subtlety of this law to the barbarians subjected to Our state, even if they have been distinguished with dignities of such kind, so that they may, should they wish, contract marriage by bare consent. We do not prohibit the others – with the exception of these that have been distinguished with the

highest dignities, as it has already been stated – of whatever they may be dignity or official rank or inclination to take wives with dotal deeds, if anyone (*sic!*) of them wishes or may do so. Yet if he has not safeguarded these provisions, We rule that the marriages contracted solely by affection should be firm and we command that children born out of them should be legitimate.

Chapter Four chiefly considers the marriage of high ranking persons contracted without the prescribed formality before their elevation. In such a case the marriage and its issue are deemed, nonetheless, legitimate. The last clause of the text dispenses the unions of all the others ‘of whatever dignity, or office, or inclination’ from the duty to make a dotal agreement. It is not exactly clear, however, whether this group would include ‘the officials of the rank of *honestiores* and of all kinds of more dignified professions’ mentioned in *Nov.* 74.4.1, or not. The expression ‘all the others’ seems to speak for the former – and so was understood by Arjava and Beaucamp. Yet, let us notice that the first sentence of this chapter mentions both ways to record the marriage of these ‘decorated with highest dignities *up to* the level of *illustres*’. And so, it may deal with the two groups of the noblemen individuated in *Nov.* 74.4.1 together. Two *scholia* explaining the version of *Nov.* 117.4 preserved in the Basilica might confirm this point, or at least show that shortly after the promulgation of the norm there was already some confusion in its exact application.²⁷

B. 28.4.51 (47): τὸν γάμον διάθεσις ἀμοιβαία ποιεῖ, τῆς τῶν προύφων οὐκ ἀεὶ ἐπιδεομένη προσθήκης (Scheltema – Holwerda A IV 1338).

Mutual will makes marriages, and it does not always need an addition of dotal deeds.

scholion οὐκ ἀεὶ: ἀλλ’ ἢ ἐπὶ μόνων τῶν συγκλητικῶν. (Heimbach III 192).²⁸

Not always but only in the case of persons of senatorial rank.

²⁷ The text of *B.* 28.4.51 follows closely *Nov.* 117.4, so I am not reproducing it here.

²⁸ It is not reproduced in SCHELTEMA’S edition. HEIMBACH gives it with the following notice: [h]oc in Cod. Flor. supra verbum ἀεὶ alia manu scriptum est. (III 192, note *l*).

Οἱ ἀξιωματικοὶ μέχρι τῶν ἰλλουστρίων οὐ δύναται γαμετὰς ἀπροίκους λαβεῖν, εἰ μὴ ἄρα πρὸ τῆς ἀξίας ἠγάγοντο. Οἱ δὲ μὴ ὄντες ἀξιωματικοὶ Ῥωμαῖοι καὶ οἱ ὑποτελεῖς βάρβαροι, κὰν ἀξιωματικοὶ ᾧσιν, ὡς θέλουσιν ἀπάγονται ἀπροίκους γυναῖκας μηδὲ χρεῖαν ἔχοντες τῆς παρὰ τοῖς τῆς ἐκκλησίας ἐκδίκους γνωμένης παρατηρήσεως. Μέμνησο τῆς οδ'. νεαρᾶς (Scheltema – Holwerda B v 1844).

The most distinguished up to the *illustres* cannot take undowered wives, unless, perchance, they took them before the dignity. Contrariwise, these Romans who are not the most distinguished and the subdued barbarians, even if they should be the most distinguished, they take undowered women for themselves, if they wish, without necessity of the notice (made) in presence of the defenders of the church. Recall *Novel* 74.

If we combine these two notes together, we may see that in the view of the legal experts of the time the two originally different ways of documentation of marriage – dotal deeds for the highest ranks and special attestations made by the defenders of the church for the less noble classes – got somehow intermingled.²⁹ Besides, the dispositions of *Nov.* 74 making the defender a marriage witness cannot have been unanimously perceived as abrogated, otherwise the Scholiast would have not recalled them at the end of his note and would have not referred the reader to *Nov.* 74 itself.

At any rate, the doubt cannot be convincingly cleared: needless to say we do not possess a single document that may evidence this procedure. None of the nuptial deeds from the Byzantine Egypt are made by persons to whom the regulations in *Nov.* 74 (and perhaps 117) were addressed. It may seem therefore that the normative never left any trace in the legal

²⁹ One cannot help observing that the barbarians who are exempted from the duty to take only dowered wives actually had it in their legislations, cf. *Lex Rom. Burg.* 37.1–2, commented in *Postilla*, pp. 148–151. It is interesting to see that authors of the *Liber Syro-Romanus*, even if they perceive making a dotal document as normal (cf. § 87a, citing a law, unknown from the other sources, of the emperor Leo), make concession for marriages made without that formality, recognising that there are many peoples that do not have this custom (cf. § 87b, 3–4, which underlines the legitimacy of the issue born to couples married by ‘trust’ only). See further, W. SELB & H. KAUFHOLD, *Das syrisch-römische Rechtsbuch*, III: *Kommentar*, Vienna 2002, pp. 181–184, with literature.

practice. Yet, this argument *ex silentio* is obviously far from convincing, given the fact that there are only a very few extant matrimonial instruments datable to the period in question so our documentation is merely accidental.³⁰

There is, however a singular document coming from the Archives of Dioskoros that may illustrate further the actual circumstances which may have prompted Justinian to issue his regulation. I will now turn to this text, keeping the safe-guard of its being a mere exemplification and bearing in mind that it post-dates the regulation and also concerns people of infinitely lower rank than the subjects of *Nov.* 74 and 117.

3. P. CAIR. MASP. I 67092

The papyrus in question is a petition to the *riparius* of Aphrodite, Flavius Victor, by a woman called Aurelia Eirene against a certain Makarios and his mother. It is dated to 21 September 553.

[✠] Φλ(αρίω) Β[ί]κτορ[ι τῶ α]ἰδεσίμω
 [ῥ]ιπαρίω κώμης Ἀφροδίτης
 [τοῦ Ἀντ]αιοπολ[ίτ]ου ν[ομ]οῦ † Ἀὐρηλία
 4 [Εἰρ]ή νη Ἰωάννου, ἐκ μητρὸς Θετοῦτος,
 ἀπὸ τῆς [α]ὐτῆς κώμης Ἀφροδ(ίτης),
 [χ]αίρ(εω). οἱ ἐξῆς ὑποτεταγμένοι

³⁰ CPR 1 30 = *M. Cbr.* 290 (Arsinoe, 6th cent.; another scrap of fragment 1 of the same papyrus was published as *SB* xv1 12398, but it is not certain whether it belongs to the marital agreement); *P. Ness.* 18 (Nessana, 537); *P. Ness.* 20 (Nessana, 538); *P. Michael.* 42 a-b (Aphrodite, 30 December 566); *P. Cair. Masp.* 111 67340 recto (Antinoopolis, written between 566–573 but reporting an act from the times of Justinian); *P. Cair. Masp.* 1 67006 verso (Antinoopolis, 566–573); *P. Lond.* v 1710 (Antinoopolis, 566–573), to which *SB* xx 15633 may belong (just the beginning of the deed); *P. Lond.* v 1711 = *P. Cair. Masp.* 111 310 (Antinoopolis, 566–573); *SB* v1 8986 (Apollonopolis Magna, 640/1); and two Coptic deeds: *SB Kopt.* 111 933 (Hermopolite nome, 7th/8th cent.) and *P. Bal.* 152 (Bala'izah, 7th/8th cent.). *P. Lond.* v 1725 + *P. Münch.* 3 (Syene, 6 March 580) is an indebtment document issued by the husband to the wife.

- 8 *τετολμηκῶς παρανόμῳς*
ὑβρ(ίς)ειν καὶ ὄρκον ἀποθέσθαι
μοι τῇ εἰρημένῃ Εἰρήνῃ ὅτι· λαμβάνω
[σ]ε εἰς γυναιῖκαν. νῦν δὲ ἐχλευάσθην
παρ' αὐτοῦ· τοίνυν ἐπιδίδωμι
 12 *τῇ ὑμῶν ἐντρεχείᾳ τούτους μου*
τοὺς λιβέλλους. παρακαλῶ οὖν καὶ
[δέο]μαι αὐτὴν κελεῦσαι αὐτὸν ἐν ἀσφ(αλεῖ)
ποιῆσαι ἄχρι κρίσεως δικαστικ(ῆς)
 16 (2nd hand) † *Ἀύρηλία Εἰρήνῃ Ἰωάννου*
ἢ προκ(ειμένη) τοὺς λιβέλλους ὡς π[ρό]κ(εῖται).
Ἀύρηλιος Ἐνώχ Ἡρακλείου ἀξίω-
[θ]εῖς ἔγραψα ὑπὲρ αὐτῆς
 20 *[γ]ράμματα μὴ εἰδ(υίας) †*
(1st hand) εἰσὶν Μακάριος χαλκοτύπ(ος)
καὶ Τκουῖκουῖς μήτηρ αὐτο(ῦ)
με[τ]ὰ τὴν ὑπατείαν Φλ[(αυίου)] Βασιλείου τοῦ
 24 *ἐ[νδο]ξο[τ]άτου ἔτους δ[ωδ]εκάτου,*
[Θ]ῶ[θ] κδ δευτέ[ρα]ς ἰνδ(ικτίονος)

verso

† *λίβελλ(οι) Εἰρήνης Ἰωάνν[ου] †*

6. ὑποταγμενοι || 10. 1. γυναῖκα || 16. ἰωαννου || 19. ὑπερ || 20. BL VII 34: εἰδῖς prev. ed. – v.1. ἰωανν

† *To Flavius Victor the respectful riparius of the village Aphrodite of the Antaeopolite Nome. † Aurelia Eirene daughter of Ioannes of mother Theodos of the same village of Aphrodite, greetings.*

The below-appended (summons). The one who dared unlawfully harm (me),³¹ and deferred from the oath (given to) me, the petitioning Eirene, that 'I take you for wife'. But now I have been jested by him. Therefore I submit

³¹ Or perhaps: 'dared commit outrage (against me)' if *υβρειν* is to be understood as 'ὑβριν'.

to Your Aptitude my summons (libella). I ask thus and I request Your Aptitude to order that he is put in safe-guard until the court hearing.

✠ *Aurelia Eirene daughter of Ioannos the above-mentioned, (submitting) the summons as above. Aurelios Enoch son of Herakleios being required (to do so) wrote for her, not knowing letters. ✠*

There are Makarios, coppersmith and Tkouikouis his mother.

After the consulate of Fl. Basileius, the most illustrious, in the twelfth year.

Thoth 25, in the second indiction. (21 September 553).

Verso: Summons of Eirene daughter of Ioannes

The aim of the petition is very simple and quite similar to other examples³² of petitions addressed to the police-officials.³³ Aurelia Eirene asks the *riparius* Flavius Victor³⁴ to arrest and keep at safe until the trial a certain Makarios, a coppersmith, who apparently promised to marry her – or even in the eyes of the woman actually married her, and then left her. Eirene wants also the mother of Makarios, Tkouikouis – the ‘Tiny-Tiny-one’ – to be kept in custody and tried. The papyrus does not give us any grounds to reconstruct the possible fault of the would-be-mother-in-law. We may only guess that like some other strong mothers known from the legal and papyrological sources she might have interfered with the couple and influenced her son

³² Cf., e.g., *P. Lips.* 1 37 (Hermoupolis Magna, 389); *P. Oxy.* xvI 1886 (Oxyrhynchus, 472 [?], petition to the defensor Fl. Apion), or three concise petitions coming from Aphrodite and fashioned in a very similar way to the one under examination: *SB* xvI 12371 (6th cent.; Aur. Ioannes and Apa Nechatos concerning unlawful physical assault); *P. Cair. Masp.* 1 67091 (2 September 528; a soldier Flavius Victor to riparios Klaudios Apollos concerning a theft); and 1 67093 (11 August 553; Aur. Victor to Fl. Victor; the reason of the query has not been preserved).

³³ On *riparii*, see recently Sofia TORALLAS TOVAR, ‘Los *riparii* en los papiros del Egipto tardoantiguo’, *Aquila legionis. Cuadernos de estudios sobre el ejército romano* 1 (2001), pp. 123–151; EADEM, ‘The police in Byzantine Egypt: The hierarchy in the papyri from the fourth to the seventh centuries’, [in:] Angela McDONALD & Christina RIGGS (eds.), *Current Research in Egyptology 2000* [= *BAR International Series* 909], Oxford 2000, pp. 115–123.

³⁴ On him and the other *riparii* of Aphrodite, see B. PALME, ‘Die *riparii* des Dorfes Aphrodite: Claudius bzw. Flavius Apollos, Aurelius Apollos und Flavius Victor’, [in:] H. HEFTNER & K. TOMASCHITZ (eds.), *Ad fontes! Festschrift für Gerhard Dobesch*, Vienna 2004, pp. 841–854.

and made him leave Eirene (a picture well fitting the perennial stereotypical image of mother-in-law and the daughter-in-law relation).³⁵ Also the exact legal nature of the complaint against the untruthful man remains a mystery. Yet, there are some feeble traces that might help with its reconstruction.

Eirene claims that the man, having declared to take her as his wife, lawlessly harmed her. What should be understood under the verb *ὕβριζεν* (or the noun *ὑβρις*) she uses in her petition? The question is rather difficult, given the manifold semantics of this word.³⁶ Naturally, we could simply take it literally – the broken promise of Makarios was an outrage to his promised spouse. We could venture perhaps a more precise attribution of this insult. The expression in question is fairly common in the parlance of the papyri of all times. Friedrich Preisigke renders it with ‘Übermut, schmäliche Behandlung, Beleidigung, Ehrverletzung, frevelhaftes Vorgehen, Verstoß gegen Ordnung und Gesetz’. *Hybris* appears in some late-antique papyri, in a context similar to ours. *P. Select.* 13 (Herakleopolis, 25 June 421) is not much of assistance: Aurelia Maria swears she will not argue anymore with Iulianos who has accused her of an act of *hybris* against him. Unfortunately, there is nothing in the papyrus which could hint what kind of outrage the woman did.³⁷ In *P. Vind. Sal.* 15 (provenance unknown, 5th/6th cent.), a poorly preserved petition concerning theft of cattle, the petitioner claims ‘he has been wronged

³⁵ For other examples, usually involving a mother intervening in her daughter’s affairs, see R. TAUBENSCHLAG, ‘Die *materna potestas* im gräko-ägyptischen Recht’, *ZRG RA* 49 (1929), pp. 115–128. This author probably went too far by ascertaining the legal nature of the mother’s power over her children. It seems much more correct to see in these cases a social instrument and authority of a parent: see further J. URBANIK, ‘Pater tamen’ (cit. n. 13), pp. 293–336, at 328–333, and n. 91 & 93. See also, for the sake of an illustration, C. 6.25.5.1 (20 November 257), a response given by Valerian and Galien to a certain Maxima, unnecessarily and wrongly obedient to her mother.

³⁶ For a short overview of the cultural and legal meaning in classical Greece, see most recently G. THÜR, *s.v.* ‘hybris’, [in:] *The New Pauly* V, with literature cited therein. For the Graeco-Roman Egypt, see R. TAUBENSCHLAG, *The Law of Greco-Roman Egypt in the Light of the Papyri 332 BC – 640 AD*, Warsaw 1955 (2nd ed.), pp. 435–442; for Byzantium, see Corinne JOUANNO, ‘Réflexions sur pouvoir et démesure à Byzance’, *Kentron* 23 (2007), pp. 127–165.

³⁷ Cf. an overview of H. J. WOLFF, *TR* 35 (1967), p. 154, where the problem is summed up, as well the commentary of the editor.

because of (or perhaps by) his master'. The sender of a short letter, particular for its bizarre spelling, *P. Ross. Georg.* III 14 (provenance unknown, 6th cent.) suffered *hybris* because someone had sent workers without chisels. Finally, in two other papyri from the Archives of Dioskoros *hybris* seems to have a more specific meaning. In a will, *P. Cair. Masp.* II 67152 (= *FIRA* III 66, its draft is preserved as *P. Cair. Masp.* II 67151, Antinoopolis, 15 November 570), it denotes 'insolence' – the testator disinherits his relatives not because of his *hybris*. Yet perhaps the most interesting trace is given by *P. Cair. Masp.* I 67006, a marriage contract of Viktorine. The husband, Aphoutis, undertook not to maltreat her in any way: *μηδὲ ὑβρίζειν αὐτὴν εἰς σῶμα μηδὲ εἰς πρόσωπον μηδὲ ἐξωθεῖν αὐτὴν τοῦ . . . πνεύματος μηδὲ ἐτέραν γυναῖκα [ἤ(?)] παλλακίδα ἐπισυντάττειν* – 'and neither to commit any outrage against her, nor to the body, nor to the face, and not to expel her . . . and not to bring in another wife or (?) a concubine'.³⁸ One could possibly understand the first object of the verb *ὑβρίζειν* as referring to a physical assault and the second as any kind of shaming of Viktorine's honour.³⁹ What kind of insults may be understood as *hybris* is well illustrated by the famous complaint of a Christian woman against her maltreating husband, *P. Oxy.* VI 903 (4th/5th cent.).⁴⁰ The document, written in elegant book letters, starts with a larger title where all the misdemeanours of the man are captioned as *hybris* (I. I: *περὶ πάντων ὧν εἶπεν κατ' ἐμοῦ ὑβρεων*), and proceeds with a list of insults: imprisoning of the slaves of the wife and her foster-daughter, beating her slave Zoe, insulting (*hybris* again) of the husband's slaves and Zoe, setting fire on foster-

³⁸ *P. Cair. Masp.* I 67006, 135 (reading text). For the duties of the wife, see above, n. 25.

³⁹ In another Dioscorean marriage contract, *P. Lond.* V 1711, 39 (= *FIRA* III 18, Antinoopolis, 566–573, cf. its draft, *P. Cair. Masp.* III 67310 and the translation in Jane Rowlandson, *Women & Society in Greek & Roman Papyri*, Cambridge 1998, no. 155), the obligations undertaken by Horouonchis towards his wife, Scholastikia, are justified by the fact that noble women treat their fortunate and dearest husbands *δίχρα ὑβρεω[ς] καὶ ἀψυκορίας*.

⁴⁰ Cf. the most recent translations in Rowlandson, *Women* (cit. n. 39), no. 153, and Mary R. LEFKOWITZ & Maureen B. FANT, *Women's Life in Greece and Rome: A Source Book in Translation*, no. 159 (available on-line at <<http://www.stoa.org/diotima/anthology/wlgr/wlgr-romanlegal159.shtml>>). For a legal commentary regarding divorce in this case, cf. URBANIK, 'Introduction' (cit. n. 13).

daughters, stripping them naked and torturing. The husband at certain point swore in the presence of the bishops that he would stop maltreating the wife (cf. I. 15: οὕτε ὑβρίζω αὐτήν ἀπεντεῦθεν), and signed a nuptial agreement with her – the couple had originally contracted marriage without a written deed. The whole story – as we well remember – did not terminate with a happy-ending: shortly after the perfection of the marriage agreement the man continued his assaults depriving the wife of the keys to the house (perhaps a distant image of the tantamount of the stereotypical Roman divorce), mismanaging the wife's finances and finally threatening her that he would take up a woman of the world, a prostitute (πολιτικῆ).

The context sketched by the above-discussed papyri fits well the use of the words ὑβρίζειν / ὕβρις in some late-antique legal sources. The most obvious connection provides the Roman law delict of *iniuria*, 'outrage' or 'insult'. It is enough to recall here the introduction to this figure given by Justinianic *Institutions* and their Greek paraphrase by Theophilos: *iniuria* equals ὕβρις.⁴¹ In various *Novels* the act of *hybris* denotes a sexual abuse or misconduct.⁴²

Yet two passages from *Nov.* 117, to which various provisions I have already referred in this article, are especially interesting in this instance. Among various licit causes for a unilateral divorce that the law enumerates, we find under *Nov.* 117.9.5 a provision permitting the wife to divorce her husband if he has entertained in their house another woman or

⁴¹ I. 4.4 *pr.*: Generaliter iniuria dicitur omne quod non iure fit specialiter alias contumelia, quae a contemnendo dicta est, quam Graeci ὕβριν appellant – 'In general everything that is done against the law is called *iniuria*, in particular it denotes insult, which has been called so from speaking despicably and which the Greeks call *hybris*'. Cf. Theoph., *Para.* 4.4 *pr.*

⁴² Cf., e.g., *Nov.* 134.9.1 (556), which sets the conditions of women's imprisonment. No female is to be guarded by a man, so on this occasion she may not suffer an abuse of her virtue (ὕνα δι' ἀφορμῶν εὐρεθῶσι περὶ τὴν σωφροσύνην ὑβριζόμεναι). Another example could be taken from the first part of *Nov.* 74. § 1 of the act lists exceptions to the general rule that the children are legitimated by the subsequent marriage of their parents and execution of the marriage deeds on this occasion. No marriage would be necessary to legitimate children born of a woman whom the father did not want to marry because he thought that she was not worth the legitimate name of a spouse having committed abuse against herself (οὐδὲ ἀξίαν αὐτὴν ἡγείτο νομίμου τινὸς ὀνόματος, τὴν δὲ ἑαυτὴν ὑβρίσασαν) – a specimen as the Emperor declares 'not unknown to us'.

should be found frequenting other ladies out of the marital house. The betrayed wife shall receive back her dowry, nuptial donation and additional sum equaling the third of the value of the donation as a recompense for such a *hybris*.⁴³ While this clause seems to correspond to the offence on Viktorine's honour in *P. Cair. Masp.* 1 67006, the other provision resembles physical assaults. And so Chapter Fourteen of the same law establishes that a wife who has been beaten by her husband may not divorce him because of that, but she will be entitled to the sum equalling the third part of the nuptial donation on account of this *hybris*.⁴⁴

What was the aim of Eirene's petition then? We obviously cannot ascertain it, but it seems that by the *hybris* she has suffered she may have

⁴³ *Nov.* 117.8.5: Ἐάν ὁ ἀνὴρ τῷ αὐτῷ οἴκῳ, καθ' ὃν μετὰ τῆς αὐτοῦ γυναικὸς συνοικεῖ, περιφρονῶν αὐτῆς μεθ' ἑτέρας εὐρίσκηται [[έν τῷ αὐτῷ οἴκῳ – *del.* HEIMBACH]] μένων, ἢ κατὰ τὴν αὐτὴν πόλιν διάγων ἐν ἑτέρῳ οἴκῳ μετὰ ἄλλης γυναικὸς συνεχῶς μένων ἐλέγχηται, καὶ ἅπαξ καὶ δις ἐγκληθεῖς ἢ διὰ τῶν ἑαυτοῦ γονέων ἢ διὰ τῶν τῆς γυναικὸς ἢ δι' ἑτέρων τινῶν ἀξιόπιστων προσώπων τῆς τοιαύτης ἀσελγείας μὴ ἀπόσχηται, ἐξεῖναι τῇ γυναικὶ καὶ ὑπὲρ ταύτης τῆς αἰτίας διαλύει τὸν γάμον, καὶ ἀναλαμβάνει τὴν δεδομένην προῖκα καὶ τὴν προγαμιαίαν δωρεάν, καὶ ὑπὲρ τῆς τοιαύτης ὕβρεως τὸ τρίτον μέρος τῆς διατιμῆσεως, ἣν ἢ προγαμιαία ποιεῖ δωρεά, ἐκ τῆς ἄλλης αὐτοῦ περιουσίας λαμβάνει, κτλ. – 'And if the husband should be found staying with another woman in the house in which he lives with his wife, to the prejudice of the latter, or should be exposed to continuously spend time in another house with another woman in the same city, and, having been reproached once or twice by his own parents, or these of the wife or by other respectful persons, he should not abandon this type of debauchery, let the wife be able to dissolve the marriage because of this reason, and let her take back the dowry that had been given and the pre-nuptial gift, and for such a offence let her have from the husband's estate the third part of the value that the pre-nuptial gift had when it was made (...).'

⁴⁴ *Nov.* 117.14: Εἰ δέ τις ἰδίαν γαμετὴν μάστιξιν ἢ ξυλοῖς τυπτήσῃ χωρὶς τινος τῶν αἰτιῶν, ἃς κατὰ τῶν γυναικῶν πρὸς τὴν τοῦ γάμου διάλυσιν ἀρκεῖν παρεκελευσάμεθα, γάμου μὲν διάλυσιν ἐκ τούτου γίνεσθαι οὐ βουλόμεθα, τὸν δὲ ἄνδρα τὸν δεικνύμενον χωρὶς τοιαύτης αἰτίας μάστιξιν ἢ ξύλοις τυπτήσῃ τὴν ἑαυτῆς γαμετὴν τοσοῦτον ὑπὲρ τῆς τοιαύτης ὕβρεως ἐκ τῆς ἄλλης αὐτοῦ διδόνα περιουσίας τῇ γυναικὶ καὶ συνεστῶτος τοῦ γάμου, ὅσον τρίτον τῆς πρὸ γάμου ποιεῖ δωρεᾶς. – 'And if anyone without a any cause should beat his own wife with cudgels or whips, what we have ordered in respect of the women on dissolution of marriage should be enough. We do not want that because of that there will be a dissolution of marriage, but if the husband be convicted to have beaten his wife with cudgels and whips without a whatever cause, he shall give to the wife from his own estate a sum equal to the third part of the gifts made before the marriage, while the marriage itself shall stand'.

understood all the above. She was an object of *iniuria* in the sense of Roman law, her honour suffered deterioration. She may hint as well to the sexual misconduct towards her of her would-be-husband: one would expect that the presumed ‘marriage’ got consummated. Finally, I suggest she may put forward financial claims during the trial of Makarios and his mother. She would not be seeking the return of the dowry or the bridal gifts augmented by a third – there were apparently none given. Yet she may make recourse to the compensation foreseen by the Chapter Five of *Nov.* 74:

Nov. 74.5: Quoniam autem interpellationibus quae nobis fiunt semper omnium assidue mulieres audimus ingemiscences et dicentes, quia quidam earum concupiscentia detenti ducant in domibus suis, sacra tangentes eloquia aut in orationis domibus iurantes habituros se eas legitimas uxores, taliter eas habentes tempore multo et forte suscipientes filios, deinde dum se satiaverint earum desiderio, aut extra filios aut cum filiis proicientes de suis domibus, iudicavimus etiam hoc oportere sanare: ut si mulier ostendere potuerit modis legitimis, quia secundum hanc figuram vir eam accepit domi ut uxorem legitimam haberet et filiorum legitimorum matrem, nequaquam penitus licentiam ei esse hanc de domo praeter ordinem legis expellere, sed habere eam legitimam et filios suos ei esse. Et illam quidem, siquidem indotata sit, nostrae constitutionis uti bonis, quartam substantiae viri percipiens, sive expellatur sive prius moriatur vir, non perscrutantibus nobis sive repudio utens dimittat eam sive etiam sine hoc: neque enim verisimile est eum mittere repudium qui et ipsas nuptias denegat. Sed si eam inrationabiliter expellat de domo, hoc ipsum sit adversus virum iusta causatio, et mulier hoc facto repudium ei mittat et exigat quartam, si uxor ostensa fuerit extitisse, licet extra dotem convenerit iuriurando credens. Quid enim agat aliud quae ad dotem non est idonea, quam ut semet ipsam sub omni dote contradat?

And since we have heard through interpellations which are always and constantly made by lamenting women saying that there are certain men who taken by desire took them to their houses and touching holy scriptures or swearing in houses of prayer that they would take them for themselves as the legitimate spouses, and in such wise having them for a long time, and perhaps having got children by them, thereafter when they had satiated their desire for them, they ejected them of their houses, sometimes without their children and sometimes with, we have resolved that this situation should be repaired. And so if a woman is able to prove by legitimate means that a man has taken her to his home in such a way that she may be his legit-

imate wife and mother of legitimate issue, by no means whatsoever is he allowed to expel her from the house, except for the cases foreseen by the law, but he must have her as legitimate and the her children as his. And she herself, if indeed she is undowered, shall use the benefit of our constitution taken the quart of the estate of the husband, no matter whether she is expelled or the husband dies. And we shall not examine whether he dismissed her using a deed of divorce or not: he is not likely to send the deed of divorce if he denies the (existence) of marriage itself. And if the husband unreasonably expels her from home, this very fact shall be a just plea against him. Having so happened the woman shall send him the deed of divorce and demand the quart, if she can prove that she was the wife, even if she joined (him) without a dowry trusting his oath. For what else may a woman – who is unable to have a dowry – do, one who gives herself in place of a dowry?

What a striking resemblance to case of Eirene! Just like the women mentioned by the legislator, she had no reason to believe she was not legally married to Makarios. Could we venture then that the person who helped her to fashion her petition would advise her to seek a compensation equaling the quarter of her ex-husband's estate and perhaps to have presumed marriage officially recognised as divorced?⁴⁵ Unfortunately, nothing allows us this so far going reconstruction. Yet, were it the case, it would yet again show that the imperial law regarding everyday matters, marital cases, dowries, and successions was not entirely unknown in the circle of Dioskoros.

Postilla:

C. Th. 3.7.3 and Nov. Maior. 6.9

as the presumed turning points in the Roman law of marriage.

I stated at the beginning of this article that *Nov. 74.4* seems to be the first attempt of a conscious change in the structure of classical law of marriage. Some scholars suggest that this moment actually happened before,

⁴⁵ We may also observe here that Justinian constitutes *eo ipso* another rightful case for a unilateral divorce, not repeated later in *Nov. 117.7-9* (542). This fact seem to have been overlooked by the scholarship (cf., e.g., E. BABANICAS, 'Il divorzio nella legislazione giustiniana', [in:] F. PASTORI [ed.], *Atti del II Convegno sulla problematica contrattuale in diritto romano. Milano 11-12 maggio 1995*, Milan 1998, pp. 154-172).

as early as in 428 in the East (*C. Th.* 3.7.3) and 458 in the West (*Nov. Maior.* 6.9).⁴⁶ Obviously both regulations are, *prima facie*, similar to the Justinianic law, yet, first of all, they do not conscientiously intend to change the very structure of marriage based on consent of the parties (in fact *C. Th.* 3.7.3 expressly upholds the principle of *affectio maritalis*), and secondly their purpose is totally different. The legislator in both cases tried securing patrimonial rights of the bride rather than securely establishing the moment of creation of marriage.

C. Th. 3.7.3: Impp. Theod(osius) et Valentin(ianus) AA. Hierio p(raefecto) p(raetori)o. Si donationum ante nubtias vel dotis instrumenta defuerint, pompa etiam aliaque nubtiarum celebritas omittatur, nullus aestimet ob id deesse recte alias inito matrimonio firmitatem vel ex eo natis liberis iura posse legitimorum auferri, inter pares honestate personas nulla lege inpediente consortium, quod ipsorum consensu atque amicorum fide firmatur. et cetera. Dat. x Kal. Mart. Constant(ino)p(oli) Felice et Tauro cons.

If instruments of prenuptial gifts or dowries should be lacking and if the solemn procession and other wedding ceremonies should be omitted, no person shall suppose that on this account a marriage otherwise legally entered into shall lack validity or the rights of legitimacy can be taken from children born of such a marriage, when the marriage is contracted by persons of equally honourable status and precluded by no law, and when it is confirmed by the consent of the parties and the reliable testimony of friends [21 February 428]' (trans. by C. Pharr).

As we can see the tenor of the law is rather confirming the old rule of common consent as the fundament of marriage than replacing it with the duty to constitute a dowry (such would be the case – and only via not so secure reasoning *a contrario* – of unions of people of unequal status). Strangely enough this law is audibly echoed in *Lex Rom. Burg.* 37.1–2, which, in clear contradiction to the Roman tradition, lists marital donation as a requirement of every marriage.

Lex Rom. Burg. 37.1–2: Nuptiae legitimae contrahuntur, si conventu parentum aut ingenuorum virorum intercurrente nuptiali donatione legitime

⁴⁶ ARJAVA, *Women* (cit n. 2), p. 206, n. 5, and ANNÉ, 'La conclusion' (cit. n. 3), pp. 514–515.

celebrentur. Quod si pares fuerint honestate persone, consensus perficit nuptias; sic tamen, ut nuptialis donatio solenniter celebretur; aliter filii exinde nati legitimorum locum obtinere non poterint (...)

1. Legitimate marriage is contracted, if it is lawfully celebrated with the consent of the parents or free-born men and being accompanied by a nuptial gift.
2. If there are persons of equal noble rank, a consent perfects marriage, yet only if there is solemn celebration of a nuptial gift; otherwise children born therefrom cannot obtain the place of legitimate (issue) (...).⁴⁷

The short-lived constitution of Majorian, abrogated as soon as in 463 by *Nov. Sev. 1* (and termed by this act as an *unjust law*),⁴⁸ may neither be interpreted in the way suggested by Anné and Arjava. The whole statute deals with the rights of daughters whose parents would try to exclude the patrimonial division forcing them, for instance, to enter monasteries or giving them in marriages below their class. Chapter Nine introduces the duty to make the value of the dowry correspond the prenuptial donations. In an attempt to secure property rights of the newly-wed the legislator decided as well to taint with infamy people entering undowered marriages, and to declare these unions void:

Nov. Maior. 6.9: Et quia studiose tractatur a nobis utilitas filiorum, quos et numerosius procreari pro Romani nominis optamus augmento et procreatis competentia commoda perire non patimur, hoc necessario putavimus praecavendum, ut marem feminamque iungendos copula nuptiali par condicio utrimque constringat, id est ut numquam minorem quam exigit futura uxor sponsaliciam largitatem dotis titulo se noverit conlaturam, scituris puellis ac parentibus puellarum vel quibuscumque nupturis ambos infamiae maculis inurendos, qui fuerint sine dote coniuncti, ita ut nec matrimonium iudicetur nec legitimi ex his filii procreentur.

Because the welfare of children is carefully considered by Us, since it is Our wish that they shall be procreated in great numbers for the advancement of the Roman name and We do not permit the ones who have been born

⁴⁷ Cf. as well REYNOLDS, *Marriage* (cit. n. 21), pp. 114–115.

⁴⁸ See, above all, WIELING, ‘*Iniusta Lex Maioriani*’ (cit. n. 23), *passim* but especially pp. 400–407; *ibidem*, p. 400, n. 41, for the rejection of earlier scholarship postulating either Christian or oriental influence on the Maiorian’s promulgation.

to lose their due advantages, We consider that the precaution must necessarily be taken that an equal condition on both sides should bind a man and a woman who are to be joined in a nuptial union, that is the future wife shall know that she shall never pay under title of dowry less than she obtained as a betrothal gift. Girls and the parents of girls and any persons whatever who are going to marry shall know that if they should be joined in marriage without dowry, both parties must be so branded with the stigma of infamy that neither will the union be adjudged a marriage nor will legitimate children be procreated by such persons (trans. by C. Pharr).

Read alone the passage would indeed seem to change the principle *consensus facit nuptias*. Yet Hans Wieling following the argumentation of Francesco Brandileone convincingly demonstrated that Chapter Nine of the *Novel* should be read together with chapter ten. The emperor turns there against the avarice of the bride's parents trying to despoil the groom of his property by only taking gifts from young men 'aroused by desire' and not giving anything in return, beguiling their sons-in-law with vain hopes of future dowries.⁴⁹ And so the dowry (and not the document of marriage!) was only compulsory when it was to counterbalance riches conferred by the future son-in-law to his fiancée or her parents.

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⁴⁹ Cf. WIELING, '*Iniusta lex Maiorani*' (cit. n. 23), p. 404-406.