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Richard V. Cudjoe

## THE PURPOSE OF THE «EPIDIKASIA» FOR AN «EPIKLEROS» IN CLASSICAL ATHENS

### INTRODUCTION

In a maze of uncertainties expressed by scholars about the position of a minor *epikleros* whose father died intestate, Hruza, supported by Beauchet, and noted by Wyse, holds the view that the *epidikasia* for an *epikleros* has the effects of betrothal, and converted the *epikleros* at once into a lawful wife of the successful claimant despite her tender age <sup>1</sup>. Hruza's contention seems to be reinforced by Wolff and MacDowell. In an article in *Traditio*, Wolff has noted that the archon only permitted the successful claimant «to proclaim the woman as his wife but he did not establish the claimant's right» at the *epidikasia* for the *epikleros* <sup>2</sup>. Wolff, however, does not tell us whether the successful claimant's proclamation of the woman as his wife took place there and then at the *epidikasia*, or it was issued sometime after the procedure was over though he is perfectly right in noting that he did not establish the claimant's right. But the views of Hruza and Wolff appear to have support from MacDowell who also claims that the *epidikasia* of an *epikleros* to a man was equivalent to *engye* (betrothal). He maintains in his work on Athenian law:

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<sup>1</sup> See Wyse, *The Speeches of Isaeus*, Cambridge 1904, p. 322.

<sup>2</sup> H.J. Wolff, *The Origin of Judicial Litigation among the Greeks*, «Tradition» 4 (1946), p. 70.

When the claim was for an *epikleros*, the procedure was exactly the same as when it was simply a claim for an inheritance; and the award (*epidikasia*) of an *epikleros* to a man was equivalent to *engye* for the purpose of making the marriage valid and the children of it legitimate.

Then in another work he reiterates his claim in the following words:

It is well known that in Athenian law a woman left in this position (that is an *epikleros*) could be claimed in marriage by her father's nearest surviving male relative, to ensure that her father's property remained in the family.<sup>3</sup>

At least this is the impression Harrison also creates in his brief discussion of the procedure of *epidikasia*<sup>4</sup>. Thus there seems to be the conventional opinion that the primary objective of the *epidikasia* where an *epikleros* was concerned was to award her in marriage to the father's nearest male relative. This, *ipso facto*, also implies that the archon had betrothal powers by virtue of his administration of the *epidikasia*. However, although modern commentators' opinions may have been influenced by litigants' several references to claiming the *epikleros* in marriage in the orators, I consider the collective traditional view of commentators as misconceived and misapplied. For the expressed opinions fall short of the significance of the *epidikasia*, and unduly vest the archon with absolute betrothal powers in the Athenian family which he did not have. The fact that the archon had wide-ranging powers and responsibilities in the Athenian family with the reforms of Solon is well-known among scholars. These judicial powers and duties are spelt out extensively by the author of the *Athenaion Politeia*, henceforth referred to as the *Ath. Pol.* 56.6-7. The obvious inference one can make from these judicial and executive duties is that the archon was entrusted with guardianship of the family with considerable legal and civil authority. By virtue of his wide judicial and executive duties, it was, in fact, the archon who

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<sup>3</sup> D.M. MacDowell, *The Law in Classical Athens*, Ithaca 1978, p. 103; *Spartan Law*, Edinburgh 1986, p. 97.

<sup>4</sup> A.R.W. Harrison, *The Law of Athens (i): The Family and Property*, Oxford 1968, pp. 9-12. Cf. also C.A. Cox, *Household Interests*, Princeton 1998, pp. 95-99.

administered the *epidikasia*<sup>5</sup>. None the less it is not evident that he had betrothal powers in the Athenian family as some modern commentators seem to claim.

The present paper, therefore, attempts to scrutinize the real legal import of the *epidikasia* and the implications of the executive functions of the archon in the procedure. It will claim to find as anomalous the power of betrothal in the Athenian family unduly vested in the archon, and therefore, *ultra vires*; and on this basis challenge the traditional view held by scholars that the *epidikasia* implied betrothal of the *epikleros* in marriage to her father's next of kin. By and large, I shall argue and establish that the *epidikasia* was conducted to ascertain the relationship of the claimant to the deceased, and the archon's executive role was to formally certify and validate the claimant's rightful relationship to the deceased and claim to the estate and the *epikleros*. I shall go further to contend that any decision about the married life of the *epikleros* was a later discretionary one taken by her successful claimant after the *epidikasia*, and quite independent of the archon's executive fiat.

## TERMINOLOGY

I shall begin by attempting to address the question: what is *epidikasia* in Athenian legal procedure? The Greek word which is transliterated as *epidikasia* that gave rise to the legal procedure could have several verbal or linguistic cognates. For instance, the active, *epidikazo*, with the archon or the jury as the exercising authority means «to adjudge property to one»; the passive, *epidedikasmenou*, means «having had it adjudged to one»; the middle, used either in the present imperfect, or future means «to go to law to establish one's claim», or «to sue for claim at court»<sup>6</sup>.

Modern commentators have added to these meanings. For instance, if the middle, *epidikazomai*, is used in the perfect it means «obtain»; in the aorist, it may mean either «claim» or «obtain»<sup>7</sup>. Isaios

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<sup>5</sup> See Dem. 48.26.

<sup>6</sup> H.G. Liddell - R. Scott, *Greek-English Lexicon*, Oxford 1962, p. 290.

<sup>7</sup> D.M. MacDowell (ed.), *Andokides: On the Mysteries*, Oxford 1962, p. 148. Cf. Wyse, *The Speeches* cit., pp. 323-324; Harrison, *The Law* cit. p. 11 n. 1.

gives us illustrations of the available standard meanings in two speeches. In his, *On the Estate of Dikaiogenes*, he writes:

... of the remainder of Dikaiogenes (II)'s estate an equal share was *adjudicated* to each of the daughters of Menexenos (I).<sup>8</sup>

Then in *On the Estate of Hagnias* he argues:

From what I have already said I think that you fully recognise that I am doing no wrong to the child and that I am not in the least degree guilty of these charges; but you will, I think, understand this still more exactly from the rest of my story, and, in particular, when you have heard how *the adjudication to me* of the inheritance took place. When I brought the action claiming the inheritance ...<sup>9</sup>

«Having thus described myself as the son of a cousin ... *I thus had the estate adjudicated to me by you*»<sup>10</sup>. The defendant goes on:

Did they then have some evidence material for my case, in default of which I was unlikely to *secure the adjudication of the estate*? No, I was claiming by right of kinship, not of testamentary disposition ...; if his father did not bequeath the estate to him, since *he never had any of it adjudicated to him* ... and since *you awarded me the estate by your adjudication* and my opponents brought no action at the time and have never yet thought of disputing the estate ...?<sup>11</sup>

It is evident from these passages that used in its numerous linguistic variants *epidikasia* connotes the exercise of a judicial right of some sort by the person, or the ratification of a legal right to an estate by the court. In a wider dimension regarding intestate succession whereby *epikleroi* are involved, *epidikasia* connotes extrajudicial award (adjudication) of inheritance and *epikleroi* (heiresses). With regard to the confirming or ratifying authority, the speaker of Demosthenes 46, *Against Stephanos* (II), who quotes the law on the procedure, informs us that the *epidikasia* by Athenian citizens was conducted under the jurisdiction and chairmanship of the archon,

<sup>8</sup> Is. 5.6.

<sup>9</sup> Is. 11.5.

<sup>10</sup> Is. 11.18.

<sup>11</sup> Is. 11.25-26.

while the polemarch had jurisdiction of cases involving resident aliens<sup>12</sup>.

#### PROBABLE PRESUMPTIONS

As noted earlier on, there are several passages in the orators which may have led, and might continue to make, some commentators readily presume that the *epidikasia* meant betrothal of the *epikleros* in marriage to the father's next of kin. We shall look at three of such passages for the purpose of illustration<sup>13</sup>. The first passage is in Demosthenes, the other two, in Isaios. The passage in Demosthenes is a law which the speaker of the speech, *Against Makartatos*, asks the clerk to read to the court. The law reads as follows:

As regards all *epikleroi* who are classified as *Thetes*, if the nearest of kin does not wish to marry one, he shall give her in marriage with a dowry of five hundred drachmae, if he is of the *Pentacosiomedimni* class, if of the class of Knights, with a dowry of three hundred, and if of the class of *Zeugitae*, with one hundred and fifty, in addition to what is her own. If there are several kinsmen in the same degree of relationship, each one of them shall contribute to the dowry of the heiress according to his due share. And if there are several *epikleroi*, it shall not be necessary for a single kinsman to give in marriage more than one, but the next of kin shall in each case give her in marriage or marry her himself. And if the nearest of kin does not marry her or give her in marriage, the archon shall compel him either to marry her himself or give her in marriage. And if the archon does not compel him, he shall be fined a thousand drachmae, which are to be consecrate to Hera. And any person who wishes shall denounce to the archon anyone who disobeys this law. (Dem. 43.54)<sup>14</sup>

It is important to note first what this law is not about. The law is certainly not about *epidikasia*. It, in fact, deals with obligations of the successful claimant and relatives in the same degree of relationship

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<sup>12</sup> See Dem. 46.23.

<sup>13</sup> For more of such passages see Is. 3.64, 74; 6.14; Dem. 43.5, 16; 46.18, 22, 23; 57.41; *Ath. Pol.* 43.4; Andok. 1.117-121.

<sup>14</sup> For the property classes mentioned in this law see *Ath. Pol.* 7.3-4; Plut. *Solon*, 18.1.2 (Penguin).

with the successful claimant, making provisions for the marriage of the already claimed *epikleros* who otherwise would not have an attractive property background. It is noteworthy also that the law becomes operative only when the poor *epikleros* has already been claimed and adjudicated by the court to the successful claimant. The other thing that we have to note about the law is its permissive nature. This is evident in the clause about the marriage of the *epikleros* by her successful claimant – her father's next of kin. The clause reads:

If the next of kin does not wish to marry her, he shall give her in marriage with a dowry of five hundred drachmae ...

Here, the law does not make it obligatory for the successful claimant to marry the *epikleros*. It, in fact, gives him two clear choices – *either* (i) to marry her himself *or* (ii) to give her away in marriage to someone else if he does not wish to marry her. The situation is like the permissive nature of the law regarding the lease of an orphan's estate<sup>15</sup>. But as I shall argue below, the law, none the less, makes two responsibilities to a poor *epikleros* obligatory for the next of kin to perform if he takes the second option of not marrying her himself. These are to marry her (a) to someone else, and (b) to dower her appropriately. These are the duties which call for socio-legal sanctions if the next of kin fails to perform them to the poor *epikleros* so far as the law goes.

Furthermore, the law does not give any indication that if the next of kin does not marry her himself, the next male relative could sue him and obtain the *epikleros*. In fact, suing the successful claimant in order to obtain the *epikleros* because he did not marry her was not possible as far as the Athenian law on intestate succession goes. According to this law (the intestate succession law), the estate and the *epikleros* are inseparable, and therefore could not be claimed separately. ... Whenever a man dies ... *if he leaves female children his estate shall go with them*, in the law is emphatic on this matter<sup>16</sup>.

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<sup>15</sup> See Lys. 32.23; Dem. 27.58; 29.29. Then cf. R.V. Cudjoe, *The Social and Legal Position of Widows and Orphans in Classical Athens*, unpublished Ph.D. thesis, University of Glasgow (Scotland) 2000, pp. 364-370.

<sup>16</sup> See Dem. 43.51.



Thus the next of kin to whom the estate and the *epikleros* had been adjudicated could not be sued by the next male relative and the *epikleros* taken away from him while he, as next of kin, managed and controlled her property because he did not marry her. Any reasoning and explanation of the law in that direction would sound not only speculative but also be an attempt to overstretch the implications of the law. What could legally be done is that, if after the *epidikasia* a male relative in the same degree of relationship with the successful claimant feels strongly that the adjudication had been made to the unqualified, and, therefore, the wrong person, and that he is more qualified than that person to inherit the property and marry the *epikleros*, he could sue for re-adjudication (*diadikasia*) of the property together with the *epikeros* (Dem. 43.16). It would then not be a question of fact that the successful claimant in the first *epidikasia* did not marry the *epikleros*, but a point of law that the *epidikasia* had been made to the unqualified or unentitled claimant.

Alternatively, if it became evident that the next of kin would neither take her to wife nor marry her off and dower her accordingly, that constituted an abuse or maltreatment of the *epikleros*, and, therefore, a criminal offence against her. In that case, anyone, be he the next male relative in the same degree of relationship with the next of kin, or a non-kinsman could institute an action, either private or public against the next of kin<sup>17</sup>. But neither of such suits would constitute or imply a re-claim of the patrimony and the *epikleros* from the successful claimant, as some scholars might want us to believe.

It would appear that Dem. 43.54, is the only public law that carefully monitored the marriage of the poor *epikleros*. The law is so pivotal in her married life that repeated references are made to it in the sources where her marital status comes into focus. However, I shall note only two references which readily come to mind; one from a situational probability, the other, from a real life situation<sup>18</sup>. In its entirety, the law (Dem. 43.54) emphasises the poor *epikleros*' right to marriage and dowry, and specifically sets out the procedures for her marriage. It lays down also the rates of her dowry in con-

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<sup>17</sup> See *Atth. Pol.* 56.6; Dem. 43.54; 49.67; Hyper. 4.7-8; Is. 11.33, 35. For other bibliography on these two types of suit see Cudjoe, *The Social* cit., nn. 598 and 599.

<sup>18</sup> See for instance, Is. 1.39; Andok. 1.119.

formity with the financial background and social status of her successful claimant. According to the law there are two main offences against this category of *epikleros* conceptually linked with her marriage rights. These are denial of marriage and appropriate dowry. For these offences, the archon had authority not only to punish the perpetrator but also to compel the next of kin to marry the *epikleros* himself or give her away in marriage with the appropriate dowry. Both rights and offences are thus interlocking or complementary.

As far as the ancient sources go, this seems to be the only law, as at now, that implicitly seeks to distinguish between women of the wealthy class and those of the poor group, emphasizing the marriage rights of the latter but completely silent on those of the former. The law, thus, is narrow in scope and does not cover both categories of *epikleros*. However, it appears from the rules about the *epikleros* and the extent of their application that the law regarding the marriage of the *epikleros* seems to have one peculiarity which is not always noticed. That is, it is only required in a minority of cases where there is very little or no property left for an *epikleros*. In such a situation, certain definite legal arrangement like what is in Dem. 43.54, becomes operative. But where there is much property involved, an *epikleros* always had willing claimants ready to sue for her patrimony and to marry her.

As a matter of fact, Demosthenes informs us unambiguously that even a married kinsman could divorce his wife in order to claim the patrimony of a wealthy *epikleros* and to marry her (Dem. 57.41). Solon is also purported to have banned the amalgamation of wealth by legislating that old and wealthy kinsmen incapable of performing the sexual duties of a husband should not sue for the patrimony of rich *epikleroi* and marry them because of their wealth (Plu. *Solon*, 20.2-3). Furthermore, in Aristophanes' *Wasps* (562-570), the addicted juror Philokleon delivers a pseudo-forensic speech in defence of jury attendance, listing the type of entertaining performance he can expect to witness in court and enjoy. And in a few lines later, Philokleon gives yet more outlandish forensic presentations than the preceding ones subsequently envisaged by him, such as recitations from tragedy and competitions in rhetorical entreaty by rival suitors for the hand of a rich *epikleros* (579-586). This presentation might certainly seem to be a comic, biased and exaggerated account of the proceedings in the Athenian law courts. Nonetheless, Aristophanes'

audience would not have found it amusing if the intense and highly competitive rhetorical entreaties by suitors for the hand of a rich *epikleros* bore no relation to reality in Athenian society.

With regard to the *epikleros* of the *thetic* class, however, it does seem from the force of the law and the powers vested in the archon that *epikleroi* from poor family background probably had great difficulty having husband. This is certainly because such women would bring very little or no property with them in their marriage. Thus if a deceased father left little or no property for his *epikleros*, there might be no claimant for her. This means that she might be left with no husband. And the consequence of the lack of a husband for the poor *epikleros* was that her father's lineage would become extinct. But for a family to become extinct was an intolerable situation in Athenian society and the family in particular. That is why the Athenians, and for that matter the *polis*, made a law authorizing the archon to prevent this misfortune from happening <sup>19</sup>.

The poor *epikleros*' marriage law thus had the dual fundamental motives of finding a husband for her, and, particularly, preventing the possible situation of her father's lineage becoming extinct by making the archon compel the deceased's nearest male relative to either marry her himself or arrange for her marriage. If the nearest male relative married her there was no financial cost to him. But if he decided to give her in marriage to someone else he should give her the appropriate dowry out of his own property, of course, according to his financial background and social status as stipulated by the law, unless he himself belonged to the lowest property class too <sup>20</sup>. The poor *epikleros*' marriage law was, therefore, a supportive one, reinforcing the archon's authority in Dem. 43.75, which also enjoins him to legally protect all *epikleroi*.

But, like most Athenian laws quoted in the orators, the law quoted in Dem. 43.54 does not show what form and by what procedure the archon should coerce a next of kin who denied the poor *epikleros* her right to marriage and deprived her of the appropriate dowry if he failed to marry her himself. It appears from the last clause of the law, however, that the archon's coercive authority in the case

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<sup>19</sup> See Dem. 43.75.

<sup>20</sup> Cf. also MacDowell, *Law in Athens* cit., p. 96; *Andokides* cit., p. 145 ff.

was based on a third party initiative. That is, his authority was activated only by a prosecution instituted by someone else (*ho boulomenos*). However, this was a legal action which very few citizens were willing to undertake, especially where they were in fact not victims or personally involved in the trial <sup>21</sup>. In any case, it is hard to say that the authority conferred on the archon as contained in the law constituted a betrothal power in the Athenian family.

### ISAIOS 10, «ON THE ESTATE OF ARISTARKHOS»

The speaker of this speech presents an interesting situation of a case of alleged perfidy in guardianship which needs a few comments before we proceed with our discussion. I take the liberty to paraphrase the case briefly. The speaker's mother becomes a young *epikleros* to the whole estate of her father. At her puberty, her father's next of kin under whose guardianship she had lived marries her off to someone else with only a dowry (10.4-5). In collusion with the girl's brother who had been adopted out of the family, and, therefore, legally not a member of the family again, the next of kin keeps all the remaining part of the girl's bequest. But when her husband tries to negotiate for the return of her patrimony, he is met with the blunt threat by the alleged usurpers that they themselves would obtain the adjudication of the *epikleros'* hand in marriage, thereby re-claiming her from the husband according to the law, if the husband does not keep quiet and be content with the woman and only the dowry on her (10.19). And because the man does not wish to lose his wife, the threat temporarily settles the matter until the eldest son of the woman takes up the issue again in attaining his majority. It is from this case that the second passage which could mislead some scholars to presume that the *epidikasia* was a betrothal of the *epikleros* in marriage to the father's next of kin comes into focus. The legal representative of the supposed *epikleros* whose purported patrimony is in dispute argues out to the jury:

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<sup>21</sup> Cf. R. Osborne, *Law in Action in Classical Athens*, «JHS» 105 (1985), pp. 40-58, esp. 51; D.S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens*, Princeton 2000, p. 40.

Gentlemen, though Aristomenes or Apollodoros might have had my mother adjudicated to them in marriage, yet they had no right to her estate. Seeing that neither Apollodoros nor Aristomenes, if either of them had married my mother, could possibly have had the disposal of her property – in accordance with the law which does not allow anyone to have the disposal of the property of an *epikleros* except her sons, who obtain possession of it on reaching the second year after puberty – it would be strange if Aristarkhos is going to be allowed, after giving her in marriage to another man, to introduce a son to inherit her fortune. (Is. 10.12)

The passage seems to be the contents of two separate laws compressed into a paraphrase. One of the laws talks about the inheritance of the patrimony of an *epikleros* together with the *epikleros* herself. Further references to this law are in Is. 3.74; 8.31; and 10.4-6, 19. The other law is about the taking over of her estate from her husband by her adult son<sup>22</sup>. I do not consider the structural problem mooted by Wyse and others regarding the meandering nature of the speaker's second sentence very germane to this discussion in so far as it does not obfuscate the substance of the speaker's contention<sup>23</sup>.

I find the first part of the passage rather more relevant to our subject than the rest. It puts the position of the speaker's mother into a focus that requires some kind of detailed clarifications for a better understanding of the situation described in the passage. In fact, the speaker's argument in paragraph five of the speech itself implies that his mother was still a minor when her father, her sister, and Demokhares her other brother died (10.4). The same paragraph implies also that the speaker's mother had lived under the guardianship of Aristomenes, the next of kin to Aristarkhos (I) until her majority when he married her off (10.6) because he did not marry her on account of the fact that he himself was already married with a son and a daughter (10.5).

Now, placing the passage against the general background of the case, one pertinent question arises. That is, did Aristomenes obtain

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<sup>22</sup> For the two laws see Dem. 43.51; 46.20. Cf. also Dem. 43.75; *Ath. Pol.* 56.7. For brief notes on the laws see U. von Wilamowitz-Moellendorff, *Aristoteles and Athen*, Berlin 1893, (i), pp. 258-559; P.J. Rhodes, *A Commentary on the Aristotelian Athenian Politeia*, Oxford 1981, p. 34.

<sup>23</sup> See Wyse, *The Speeches* cit., pp. 660-661.

the patrimony of his deceased brother's *epikleros* by adjudication of the court? The speaker is silent over the matter, and so the question as to whether Aristomenes obtained the property by adjudication seems extremely vexed and intractable a riddle in itself that could lead into insoluble difficulties of interpretation in the face of the existing sparse and unfavourable evidence on the matter.

In the circumstance, one can have nothing more to add than to offer the following analysis which may be considered as conjectural though plausible, regarding a story or case which is not told with sufficient precision to admit of a definite and transparent judgment. It appears that if the speaker's mother was not a minor when her father died, she had just turned a major but not married at the death of her father, Aristarkhos (I).

Either way, her patrimony together with herself had to pass to the next of kin by adjudication of the court. It is also obvious from the speaker's own argument that the mother's patrimony had been under the management and control of Aristomenes, a situation which would not have happened if the property together with the *epikleros* had not been adjudicated to him by the court according to Dem. 46.22 which reads:

The archon shall assign by lot days for the trial of claims to inheritances or *epikleroi* in every month except *Scirophorion*; and no one shall obtain an inheritance without adjudication.<sup>24</sup>

Besides, it was Aristomenes who married the speaker's mother off to the speaker's father and gave her the dowry (10.6, 19). These pieces of circumstantial evidence seem to suggest that Aristomenes must probably have got management and control of the property by adjudication of the court, though doubts may be raised about this position in the face of the slender evidence and the speaker's silence over the matter<sup>25</sup>.

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<sup>24</sup> For the month *Scirophorion* see A.T. Murray (tr.), *Demosthenes V: Private Orations* (Loeb), p. 260, n.a.

<sup>25</sup> Rightly, Prof. Maffi noted in a letter to me last July that Aristomenes may not have obtained the girl's patrimony by adjudication since he was already married and did not divorce his wife, and that there was no *epidikasia* at all. His contention seems quite plausible in the circumstance, implying that Aristomenes must have got the property under his management and control through some foul means.

And yet another question is whether the girl's dowry was part of her bequest. It is evident that if a father gave a dowry to his minor daughter's guardian to whom the girl had been betrothed, the dowry was refunded to the legal representative of the girl at the decease of her father if the expected marriage did not take place. Even if the marriage took place but the husband died later, the girl's dowry would still have to be refunded to her legal representative with profits on it as required by law <sup>26</sup>, since the dowry was an interest-bearing investment. In such circumstances, the assumption is that the dowry was part of her father's estate given to the husband for her upkeep.

In the same vein, if a dowry was given by a guardian on behalf of a female ward, particularly, an *epikleros* who was not of the *thetic* class, it was assumed as part of the profits from investing the girl's patrimony that had been given out as a dowry. For as it happened in the case of every minor orphan, the patrimony was invested and the profits used to maintain him or her until the age of majority when accounts of the bequest were rendered to him or the next legal representative if she were a female orphan. And since the expenditures on the orphan were deducted from the overall value of the bequest <sup>27</sup>, and the dowry was also part of the expenditures on the female orphan, the dowry, *a priori*, was also considered as part of her patrimony.

It is noteworthy that the Athenians had a very definite idea of what was considered a dowry in the technical sense. It was a financial asset which went into the estate of the husband from the estate of the bride's family, or from her patrimony in the case of an *epikleros* <sup>28</sup>. This is a fact that cannot be ignored if we should understand the legal principles governing the practice of the dowry at Athens. The only exception to this concept of the dowry is where the dowry was given by a third person, for instance, the *polis*, though occasionally, for a daughter of a very poor man of merit, as in the case of the daughters of Aristides <sup>29</sup>. Thus in the case of the speaker of Is. 10,

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<sup>26</sup> See Dem. 27.17; 40.6.

<sup>27</sup> Cf. Dem. 27-29, *passim*; Lys. 32.6.

<sup>28</sup> See Xen. *Oik.* 7.13.30; Pl. *Lg.* 4.721a; H.J. Wolff, *Marriage Law and Family Organization in Ancient Athens*, «*Traditio*» 2 (1944), p. 58.

<sup>29</sup> Plut. *Aristides*, 27.1 (Penguin).

since it was Aristomenes who seems to have been the next of kin to the woman's father and, therefore, her legal representative, and it was he who managed and controlled her patrimony in her minority, the dowry given for her at her marriage would have come from her patrimony and not from Aristomenes' own property. Certainly, after marrying her off and dowering her from her property, Aristomenes should have handed over the rest of her estate to her husband to manage, then later to be transferred to a son from the marriage in accordance with the law<sup>30</sup>. But this was an obligation which Aristomenes apparently did not seem to have done.

One more question for further clarification. What does Aristomenes and his colleague defendants imply by threatening that they themselves would obtain the adjudication of her hand and marry her if the husband continued to press for the wife's bequest; and how could they legally have effected their claim to achieve their objective? Of course, they apparently issued their threat in their capacity as next of kins to the woman's deceased father, and, therefore, legally entitled to the estate and the woman<sup>31</sup>. And in the case of Aristomenes he could legally have effected his action in order to achieve his objective by divorcing his wife because he was already married. He would then apply to the court claiming the inheritance as the woman had then not yet got a child in her marriage<sup>32</sup>. For as is evident in Dem. 57.41, a married next of kin could only claim an *epikleros*' patrimony together with her by divorcing his wife.

Going back to Is. 10.12, on the basis of what has been said so far, it is important to note that this passage does not specifically refer to the marriage of the *epikleros* whose estate is in dispute. However, it is obvious from the first part of the passage that the speaker admits to and recognises the legal right of either Aristomenes or his son Apollodoros to sue for the patrimony of his mother, and then to marry her. It is also evident that although the speaker's mother had been under the legal authority of Aristomenes as her father's next of kin, he neither married her himself nor married her to his son, Apollodoros, though he could have done so. But it is also note-

<sup>30</sup> Cf. Dem. 46.20; Is. 8.31; 10.12; fr. 26.

<sup>31</sup> See Dem. 43.51; 57.41.

<sup>32</sup> See Dem. 57.41; Is. 3.64; 6.46, 51, 57, 58; then cf. Wyse, *The Speeches* cit., p. 351; Harrison, *The Law* cit., pp. 309-311.



worthy that although the adjudication of an estate and any *epikleros* that went with it normally took place at the same time, the marriage that the speaker is talking about was expected to have taken place later at the girl's puberty and not when she was still a minor. I go further to maintain, deducing from the situation here, and granting that the speaker's mother together with her patrimony had been adjudicated to Aristomenes by the court, that the archon's administration of the *epidikasia* would not have constituted either betrothal or marriage whether or not the girl was a minor or an adult *epikleros*. One reason is that the archon did not have betrothal power in the Athenian family. As normally happened, the *kyrios* of the family was the person who exercised domestic power over the woman, and the chief expression of this power was his right to give her in marriage. This was a prerogative which the archon did not have since he was not the *kyrios* of the Athenian family despite his oversight responsibility over the family by operation of the law cited in Dem. 43.75. Secondly, the purpose of the *epidikasia* was not to give an *epikleros* away in marriage but to confirm a right to an inheritance.

Generally speaking, the marriage terminologies, *engye* and *ekdosis* connote specific legal implications arising out of the authority of the father or legal representative of a daughter or a ward. While *engye* implies betrothal of a daughter or ward in marriage, *ekdosis* always implies that someone gives up power over a person or thing for a specific purpose, and its effect is the transfer of rights in so far as this is required by the purpose. Note, however, should be taken of the fact that a complete or definite severance of the relationship between the transfer and the object takes place <sup>33</sup>.

It would appear that this act of giving up power over a person for a specific purpose is what Apollodorus emphasises in Dem. 59.23. And, it is noteworthy that the *engye* was not merely a betrothal but an act creative of the marital *kyrieia*, the full effectiveness of which depended on the *ekdosis* or actual transfer of the bride to the groom. This indeed inaugurated the living together (*synoikein*) of the couple. Thus the *engye* and the *ekdosis* are complementary. This relationship is vividly illustrated by Isaios throughout his speech, *On the Estate of Pyrrhos*. In the case of the archon, however, his

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<sup>33</sup> Cf. Wolff, *Marriage* cit., pp. 43-95, esp. 49.

administrative power in the *epidikasia* does not inflect any of the legal implications of the *engye* and *ekdosis* to enable the bride and the bridegroom to live together (*synoikein*) there and then without any other marriage rites.

Furthermore, it was not until the majority of an *epikleros* that her married life was decided in conformity with the regulations whether or not she was a *thetic* <sup>34</sup>. Thus in this situation, even if the patrimony of the speaker's mother together with herself when an *epikleros* were adjudicated to Aristomenes by the court, the procedure did not constitute marriage, not only because the girl was still a minor at the time, but also because that was not the purpose of the procedure. More importantly, it was not until her age of adulthood that her married life was decided and married to someone else in conformity with Dem. 43.54. The archon's administration of the adjudication in the matter would, therefore, not have constituted either betrothal or marriage whether the girl whose estate is in dispute was a minor or an adult *epikleros*.

Another statement that also seems to suggest that the procedure of *epidikasia* conferred betrothal right on the archon is again in Isaios, *On the Estate of Philoktemon*. In a section of this speech, the speaker argues that if an *epikleros* were already thirty years of age, *she ought to have been no longer under a guardian, nor unmarried and childless, but long ago married, given in marriage either by her guardian according to the law, or else by an adjudication of the court* <sup>35</sup>.

Now, a very close look at the statement shows that the speaker has ingeniously juxtaposed three different situations together backed by laws and custom in his argument to devastate the claims of his opponents. Let us identify the three situations before discussing the context within which they are placed. They are (i) the situation of the *epikleros* being no longer under a guardian at her age because she would have been given in marriage long ago by the guardian, (ii) the improbable situation of an *epikleros* not in marriage and without a child at the ripe age of thirty as a woman, (iii) the case whereby the extra-judicial procedure of adjudication (*epidikasia*) would have already been conducted to award the *epikleros* in marriage on account of her age.

<sup>34</sup> See *Ath. Pol.* 56.7; Dem. 43.54.

<sup>35</sup> Is. 6.14-15.

The second situation seems unlikely; for it would have been contrary to Athenian custom for an *epikleros* in the family (who is not a widow) to be misogamist, and, worse still, remain childless at the age of thirty. At least, there is no evidence as at now for such a situation in the sources either for an ordinary woman who is not a widow or an *epikleros*. By and large, however, the situation is suggestive of a stigma or a stain on the character of the woman. The first and third situations, however, are backed by laws (Dem. 43.54; 46.22), and, therefore, very germane to our subject. The question now arises: how could the *epikleros* have come under the tutelage of a guardian who would have given her away in marriage according to the law long before she turned thirty years? Certainly, she as a minor could have come under the legal authority of a guardian if her father appointed her one *inter vivos* or by testament (Dem. 46.14). Alternatively, she would have been claimed at the courts on the death intestate of her father (Dem. 46.22). Either way, the *epikleros* if young would have to live under the guardianship of her legal representative until her age of majority when her married life would be determined by the guardian.

But if at the age of thirty the *epikleros* is still under tutelage, unmarried and childless like a minor, then there is a stigma of some sort on either her character or her social status. Not altogether surprisingly, this is the situation the speaker seeks to exploit to his advantage in the passage under reference. It is noteworthy that the speaker is obviously casting serious doubts on the legitimacy of Kallippe, the supposed mother of his opponents (6.12-16). And he makes certain significant points about the woman. Now, granting that she were not illegitimate, her tutelage under her guardian would, in law, certainly have terminated long before attaining the age of thirty. This is because normally the age of majority for girls in Athens was fourteen. But there are two ways by which her guardianship could terminate: (i) by being betrothed in marriage as an Athenian citizen by her guardian at her marriageable age according to the marriage law concerning *epikleroi*, if the guardian does not want to marry her himself (ii) by being claimed together with her patrimony at the *epidikasia* if her guardian died, or her husband died (if she were already married), making her and her patrimony liable to adjudication again.

In these two situations, the speaker is referring to two people with different authority in the Athenian family. In the former, refer-

ence is made to the girl's guardian or legal representative who could betroth her in marriage. But in the latter situation reference is made to the archon's administrative power at the *epidikasia* after which procedure the girl could be married by the successful claimant. And the speaker implies that if at the age of thirty as a woman, and an *epikleros* one at that, neither her guardian nor the archon had exercised the appropriate authority over her, then she must be a prostitute and thus not a legitimate Athenian woman, and *ergo*, her supposed children could not inherit the estate in dispute. Significantly, here in this passage, the speaker adverts to no betrothal power of the archon. Rather, what he refers to here are (i) the betrothal power of the guardian under whose authority she would have lived until her marriageable age, and (ii) the executive role of the archon in seeing to it that the *epikleros* was awarded to the rightful claimant at the *epidikasia*. «The law» here referred to by the phrase «according to the law» is used generally, and, therefore, not definite in the technical sense. Thus it implies either Dem. 46.22 under normal circumstances (in the case of an ordinary family orphan) or Dem. 43.54 in the case of a poor *epikleros* if she were of the *thetic* class. The archon in fact administered the legal procedure of adjudication under his chairmanship and ratified it. But it should not be presumed that his executive role equated with the power to betroth, and thus convert the practice into a legal marriage procedure.

One more point for clarification. The situation in which a next of kin did not marry a rich *epikleros*, appears, in fact, non-existent in the sources, and the rules about the rich *epikleros* are least known to us, except that there must be an *epidikasia* for her and her property, the procedures of which are the same as for claiming an intestate succession.

What is important to note, however, is that a rich *epikleros* was a prize, and suitors flocked around her, as is evidenced in the sources (Dem. 57.41; Is. 3.50; 6.46; Arist. *Pol.* 1303b18, 1304a4-13).

However, that does not mean that as husband of the *epikleros*, he has absolute and permanent ownership and control of her patrimony. For by law, the patrimony of the *epikleros* should be in the possession of her children <sup>36</sup>.

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<sup>36</sup> Is. 3.50. See Dem. 46.20 for the law. Then cf. Is. 3.50, 65, 66.

It is worth noting that even if the next of kin claims the *epikleros* together with her patrimony in her minority but does not wish to marry her at her marriageable age, he probably could not give her away in marriage to anyone outside the family because the estate of the *epikleros* must remain in the family. In fact, it is generally agreed that one of the most marked continuities of ethical norms in fifth century Athenian democracy is the belief in the need for the continuity of the *oikos* through both economic stability and the generational continuity of children<sup>37</sup>. And, it would appear that it was against the background of this belief that the *polis* intervened in an affected *oikos* by introducing the intestate succession law quoted in Dem. 43.51.

In archaic Greece, the property or *kleros* allocated to a *genos* was collectively held by it, in the sense that it could not be alienated from the clan either by gift or inheritance. Hence the venerable rule, still formulated in the classical period that in the event of inheritance, the property must remain within the *genos*<sup>38</sup>.

But above all, it is important to note that the *epidikasia* is not a marriage procedure; it is a succession procedure by which the right to inherit the estate and the *epikleros* was established. Thus it was the duty of the claimant to state his right which was confirmed by the jury. As far as the evidence goes, the only legal authority in the sources that confers betrothal powers is a law quoted by the speaker of Demosthenes 46, *Against Stephanos* (II). It reads as follows:

If a woman is betrothed for legal marriage by her father or by a brother born of the same father or by her grandfather on her father's side, her children shall be legitimate. In case there is none of these relatives, if the woman is an heiress, her guardian shall marry her, and if she is not the man to whom she may be entrusted shall be her guardian.<sup>39</sup>

This law states persons in the Athenian family who had the right to betroth or give a woman in a lawful marriage. The law defines those

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<sup>37</sup> Cf. S. Goldhill, *The Great Dionysia and Civic Ideology*, «JHS» 107 (1987), pp. 58-76, esp. 67; G. Glotz, *La Solidarité de la famille dans le droit criminel en Grèce*, Paris 1904, noted by Goldhill, *ibid.*

<sup>38</sup> Cf. E. Mireaux, *Daily Life in the Time of Homer*, tr. I. Sells, London 1959, p. 54.

<sup>39</sup> Dem. 46.18. There is an element of ambiguity in the last clause of the law, but this last bit is not much our concern here. See W.K. Lacey, *The Family in Classical Greece*, London 1968, p. 283 n. 21.

who could betroth a woman who was not an *epikleros* as father, brother by the same father, and father's father. It would appear that it is the same legal right of betrothal that is implied by the plaintiff in Is. 8.14. But if she was an *epikleros* her master (*kyrios*), translated as «guardian» or more appropriately «master», shall marry her. It is noteworthy that the master (*kyrios*) of the *epikleros* referred to in the law implies the person to whom she had been entrusted by the father either *inter vivos* or by testament, and, therefore, her legal representative; or the person to whom she had been adjudicated by court at her father's death intestate.

This person to whom she had been adjudicated by the court would have been a member of the succession family, possibly a brother of the deceased, or anyone in the order of succession according to Dem. 43.51. He would then be the legal representative of the minor *epikleros* until her majority. And if the *epikleros* were of the *thetic* class, this *kyrios*, who of course, would have been the successful claimant, could, as I have argued above, also either take her to wife or betroth her in marriage to someone else as directed by Dem. 43.54, if he did not wish to marry her himself. I have noted above that, the clause regarding the marriage of the *epikleros* in question is permissive. Thus it places no legal obligation on the successful claimant to marry her himself. It would appear from Dem. 43.54, then, that normally there was no point for a man's nearest male relative to sue for the patrimony of an already married *epikleros* if he did not want to marry her.

But more importantly, neither Dem. 43.54 nor Dem. 46.18, nor Dem. 46.22, nor any other law mentions the archon among the persons who had the power of betrothal in the Athenian family. Furthermore, not even *Ath. Pol.* 56.6 where the author lists claims in which the archon's executive role is indispensable and Dem. 43.75 about his oversight responsibility over the family give betrothal powers to the archon despite his role in claims for estates and heiresses. The thesis of Hruza that the *epidikasia* had the effect of *engysis* (betrothal) and converted the *epikleros* at once into a lawful wife of the successful claimant despite her tender age, therefore, does not seem quite feasible. This argument also goes against any other views held in scholarly circles that the *epidikasia* was equivalent to *engye*.

It appears also from the arguments advanced so far that Wyse's indecision as to whether the successful claimant of a minor *epikleros*

was her guardian until she reached her puberty has no basis. He is, however, certainly right on the distinction between guardians (*epitropoi*) of *epikleroi* and their husbands (*boi synoikountes*) in *Ath. Pol.* 56.6. For the guardians here must refer to either non-kinsmen who had been designated by the fathers of the *epikleroi inter vivos* or by testament, or kinsmen to whom the *epikleroi* had been awarded by the court. On the other hand, husbands imply either kinsmen or non-kinsmen who had married the *epikleroi* and were living with them. This distinction thus tells against the paradox of tutelage and marriage of the minor *epikleros* at the same time, as seemingly proounded by Hruza.

#### THE LEGAL IMPORT AND THE IMPLICATIONS OF THE «EPIDIKASIA»

I now turn to the real and primary legal import of the procedure of *epidikasia*. According to *Ath. Pol.* 56.6, and other available pieces of evidence, all claims for estates and *epikleroi* passed through the archon for execution by the court. Every claimant applied to him setting out his grounds for his claims<sup>40</sup>. The archon then conducted a preliminary investigation (*anakrasis*), after which he sent the case to court for trial<sup>41</sup>. The jury, with the archon as presiding officer, then sat on the case. If they were satisfied with the merits of a claimant's arguments the archon certified the award, and the estate together with the *epikleros* went into the hands of the successful claimant. It is not definite in the sources as to whether the archon alone in his administrative capacity could award the property and the *epikleros* without passing the case to the jury if there was only one claim to the estate. But since Dem. 46.22 quoted above makes it mandatory for an *epidikasia* to be held in any case even if it was only one claimant suing for the estate, it would appear a fair presupposition that after the *anakrasis* by the archon the jury at any rate sat on the

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<sup>40</sup> See Andok. 1.119-120; Dem. 43.55.

<sup>41</sup> For an example of the *anakrasis* see Is. 6.12-15. On the procedure for sending the case to court for trial see Dem. 46.22. But see Dem. 48.23-26 for a postponement of the trial if a claimant later realized that he would not be adequately prepared for even when the archon had sent the case to court.

case, perhaps for the purpose of witnesses, and merely confirmed the person's right without listening to any opposing claims since there would be none, anyway <sup>42</sup>.

However, the archon's executive power in the award at the *epidikasia* in conformity with *Ath. Pol.* 56.6, did not connote a formal betrothal or a certification of marriage of the *epikleros* to the successful claimant. It aimed, in fact, to formally sanction or validate the legality of the existing rightful relationship of the claimant to the estate and the *epikleros*. For as his grounds to claim the property together with an *epikleros* a claimant had to prove that, the deceased's nearest relative being a daughter and thus *epikleros*, he himself the claimant was the nearest male relative and was, therefore, the rightful person to assume management and control of the property and be her master (*kyrios*). I carry this argument further by taking a few specific and representative passages from Isaios, Andokides, and Demosthenes.

If Polyarkhos, the father of Kleonymos and our grandfather, were alive and lacked the necessities of life, or if Kleonymos had died leaving daughters unprovided for, we should have been obliged on grounds of affinity to support our grandfather, and either ourselves marry Kleonymos' daughters or else provide dowries and find other husbands for them – the claims of kinship, the laws, and public opinion in Athens would have forced us to do this or else become liable to heavy punishment and extreme disgrace. (Is. 1.39)

For it is clear that, if he left her sole *epikleros*, he would have been fully aware that one of two things was likely to happen to her: either one of us, the nearest relatives, would obtain an adjudication and take her as wife; or if none of us wished to take her, one of these uncles who just now gave evidence, or, failing them, one of the other relatives, would, on the same principle obtain an adjudication of her together with the whole estate and take her as his wife. (Is. 3.74) <sup>43</sup>

I arranged a meeting with Leagros before our friends and told him that this was the time for decent men to show their respect for family ties. «We have no right to prefer a wealthy or successful alliance and look down upon the daughters of Epilykos», I argued: «for if Epilykos were alive, or had died a rich man, we should be claiming the girls as their

<sup>42</sup> Cf. MacDowell, *Andokides* cit., pp. 147-148.

<sup>43</sup> We may note also Is. 11.8, 17, 18.



next of kin. We should have married them either because of Epilykos himself or because of his money; we will do the same now because we are men of honour». (Andok. 1.119)

I was the one to render him this service, since I was husband to the daughter of Eubulides, she having been adjudicated to me as being the nearest of kin. (Dem. 43.13)

Again, then, I ask you, men of the jury, which is nearer of kin and more closely related to the first Hagnias, Hagnias, the son of Polemon, and Eubulides, the son of Philomakhe and Philagros, or Theopompos, the son of Kharidemos and grandson of Stratios? (Dem. 43.25)

You hear what the law says, men of the jury. But when it became necessary to sue for the *epikleros* Philomakhe, the mother of this boy and the daughter of the first cousin of Hagnias on his father's side, I came forward in respect for the law and claimed her as next of kin. (Dem. 43.55)

It is not my intention to give a complete list of all the passages in which nearness of kin for claim to property is mentioned, neither do I intend to analyse everyone of the passages just quoted above. None the less, I wish to point out what Is. 1.39 is, before I continue the discussion. Like Dem. 43.54, this passage (Is. 1.39) is not about *epidikasia*<sup>44</sup>. It is, in fact, a hypothetical situation presented by the plaintiffs, but actually specifying their responsibilities to their grandfather and their uncle Kleonymos on the one hand, and the daughters of Kleonymos who are their cousins on the other hand. That is, the legal duties expected of them if their deceased grandfather had lived in embarrassed circumstances, or if their uncle's daughters had been *epikleroi* of the *thetic* class. But putting Dem. 43.54 and Is. 1.39 side by side, it becomes obvious that Is. 1.39 is a paraphrase of the implications of Dem. 43.54. Both, therefore, carry the same socio-legal penalties.

It is evident from the passages quoted so far that claims to the archon for an estate or an *epikleros* together with her patrimony were mainly based on nearness of kinship in the family. The marriage

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<sup>44</sup> My attention was drawn in a letter to me by Prof. Maffi in June 2002; to a seeming impression created in my earlier version of this paper that Dem. 43.54, and Is. 1.39, concern *epidikasia*, which is not the case, and I agree with him.

mentioned in all the passages was a later event; it could not have taken place at the same time as the adjudication took place. Furthermore, Dem. 43.54 clearly indicates, as I have noted already, that the marriage of the poor *epikleros* to her successful claimant was not mandatory but optional according to the wishes of the claimant. Thus the jury's verdict to award an estate or an *epikleros* hinged on how able a claimant could prove his closeness of kinship to the deceased. The jury's verdict executed by the archon at the *epidikasia* was, therefore, a formal recognition and validation of the successful claimant's rightful relationship to the estate and the *epikleros*; it was certainly not a ratification of marriage of the young *epikleros* to the successful claimant. As Prof. Maffi has kindly pointed out to me in a recent letter, even if there was *engyesis* which, in fact, has the effects of a promise, the *gyne engyete* (the bride) is not yet married until the actual marriage rites were performed.

I think that the statement, *if there are several epikleroi, it shall not be necessary for a single kinsman to give in marriage more than one, but the next of kin shall in each case give her in marriage or marry her himself* in Dem. 43.54, refers to at least two *epikleroi* of variable ages of the same deceased father<sup>45</sup>. The law thus seems to have in mind both the adult and married *epikleros* of the *thetic* class who may have lost her husband, and the minor poor *epikleros*. It would seem also from the law that generally the successful claimant for an *epikleros*, whether an adult or a minor one, a poor or a rich one might not be identical with or the same as her eventual husband unless he decided to marry her himself.

The tenets of Dem. 43.54 and *Ath. Pol.* 56.7 put together imply also that, with regard to the minor *epikleros*, no practical decision about her marriage was taken until her puberty. Furthermore, according to *Ath. Pol.* 56.7, an extension of the archon's executive role in ratifying the successful claimant's rightful relationship to the *epikleros*, whether of the poor class or the wealthy class, was to validate and authorise the lease of the minor *epikleros*' patrimony until she attained the marriageable age of fourteen. This implies that until her puberty, the successful claimant was her guardian and legal representative<sup>46</sup>; and as

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<sup>45</sup> Cf. also *if he leaves behind female children his estate shall go with them* (Dem. 43.51).

<sup>46</sup> This position clears the cloud of doubt entertained by Wyse as noted above.

the legal representative he could either manage the girl's patrimony himself on her behalf or lease it out to lessees under the presidency of the archon in conformity with *Ath. Pol.* 56.7. But at the young *epikleros*' age of puberty, the status of her successful claimant as a legal representative metamorphosed into one of two distinct positions. He became either (i) her husband if he decided to marry her himself, or (ii) her *kyrios* who should then betroth and give her in marriage to someone else and dower her appropriately according to Dem. 43.54 and 46.18<sup>47</sup>.

What might also let some scholars presume that the procedure of *epidikasia* had a shade of betrothal or marriage is that there was no formal betrothal again and stipulation of a dowry at the *epikleros*' marriageable age if her successful claimant decided to marry her himself. But in this case, her marriage was automatic and procedural by mere operation of law, as laid down in Dem. 43.54. And to formalize or solemnize the legitimacy of his living together with her as his wife, and to make the public aware of the union, the successful claimant would then have to perform the marriage rites of organising the marriage feast to members of his ward, and giving a party on behalf of his wife to the wives of his fellow demesmen at the Thesmophoria<sup>48</sup>. All these events, however, were not organised by the successful claimant until the minor *epikleros* had reached her puberty, and the next of kin decided to marry her himself. Of course, these same rites were at any rate organised by the man to whom the next of kin married off the *epikleros* if he himself did not marry her.

Thus Wolff's claim that the archon only permitted the successful claimant *to proclaim the woman as his wife at the epidikasia* is not completely convincing. As argued above, it is noteworthy that the claimant himself had to establish his right first at the *epidikasia* to be certified by the archon as chairman for the *epidikasia* before he, as the successful claimant to the property together with the *epikleros*, could decide to proclaim her as his wife. And once his right had been confirmed he did not require the archon's sanction again before proceeding to make her his wife. His proclamation of the woman as his wife was his personal decision and the procedure was automatic. And, of course, this was the outcome of the estab-

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<sup>47</sup> For a typical guardian becoming the husband of his ward see Is. 6.14.

<sup>48</sup> See Is. 3.76, 80.

lishment of this right. Establishing his right to the estate, therefore, preceded his proclamation of her as his wife, a later action which did not require the executive fiat of the archon again.

#### FURTHER ARGUMENTS

It may be argued that if the next of kin did not want to marry the *epikleros* after claiming her patrimony and her the right passed to the next nearest relative. This argument may be plausible at Gortyn but not completely convincing in the case of Athens. It is important to note that the right of passage of the Athenian *epikleros* to other relatives was not possible in Athenian law if the next of kin successfully claimed the property together with her at the *epidikasia* but later decides not to marry her. In Athenian law the right of passage was permissible only in a situation whereby the next of kin did not put in a claim at all to the estate and the *epikleros*. In such a situation the next of kin forfeited his right to the estate and the accompanying *epikleros*, and the inheritance passed to the next nearest relative. Even so, the right of passage was not automatic by mere operation of law; the next nearest relative was obliged to go through all the procedures of *epidikasia* to establish or prove his nearness of kin to the deceased before the property and the *epikleros* would be awarded to him. The speaker of Demosthenes 43, *Against Makartatos*, gives us a typical instance of the right of passage in his speech. He argues:

Although Theopompos, the father of Makartatos here, was in Athens when the herald announced that if anyone wished to lay claim to the estate of Hagnias by virtue of kinship or under a will, or to deposit security for the costs of such claim, he did not venture to make a deposit, but by his own act gave judgment against himself that he had no conceivable claim on the estate of Hagnias ... But when it became necessary to sue for the hand of the *epikleros* Philomakhe, the mother of this boy and the daughter of the first cousin of Hagnias on his father's side, I came forward out of respect for the law and submitted my suit as being next of kin; but Theopompos, the father of Makartatos, neither came forward nor in any way disputed my claim, because he had no right to the estate.<sup>49</sup>

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<sup>49</sup> See Dem. 43.5, 55.

Stripped of its rhetorical flavour, the important point in the litigant's argument is that because Theopompos did not sue for the property when the inheritance became vacant he forfeited his entitlement to it, so the right passed from him to Sositheos the litigant who put in his claim as the next nearest relative. Consequently, the estate together with Philomakhe the *epikleros* was adjudicated to him at the *epidikasia* as required by the law. Thus it would then not have been only the person of the *epikleros per se* who would have passed to the next nearest relative, as may be the case at Gortyn, but the inheritance or the totality of the property as well.

But as I have noted above, once the first nearest male relative successfully claimed the inheritance together with the *epikleros*, he legally had two choices open to him: either to marry her himself, or to give her away in marriage and dower her. Necessarily, he was bound to make a choice out of the two options. There was no middle course; or was there any question of the next of kin having management and control of the estate while the *epikleros* passed into the hands of another relative because the one who first claimed the inheritance would not marry her.

One may argue also that if an *epikleros* could later be given in marriage by the *epidikasomenos* (the claimant) after the *epidikasia*, then there is no difference between her and a normal daughter who could be married away by her brother after the death of their father. Such a claim is tantamount to an argument out of ignorance of the socio-legal position of the *epikleros* in Athenian society. For one thing, unlike the formal daughter, the *epikleros* in the Athenian family was the daughter, granddaughter or great-granddaughter of a man who died leaving behind no legitimate son or grandson, or great-grandson<sup>50</sup>. For another, a normal daughter could not be married by her brother born of the same father because of their direct biological relationship in the family; but an *epikleros* could be married by a son adopted by her father and this adopted son then because her legitimate brother in the family. Furthermore, in the case of the normal daughter who had a brother, their patrimony was not handed over to the girl's husband at her marriageable age but she

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<sup>50</sup> Cf. Is. 6.46; Dem. 43.56; then cf. also MacDowell, *Law in Athens* cit., p. 95; Wyse, *The Speeches* cit., p. 685.

was given a dowry while the brother received their patrimony at his age of majority. But in the case of the *epikleros* her patrimony was give to her husband on marriage if the next of kin did not marry her himself; then to a son or a grandson of the deceased born in the marriage. Isaios informs us of why a grandson has a better claim than a cousin of the deceased in Attic laws of succession:

I suppose that you admit in principle as a self-evident fact that those who are descended from the same stock as the deceased are not nearer in right of succession than those who are descended from him. For the former are called collateral kinsmen, the latter lineal descendants of the deceased. (Is. 8.30) <sup>51</sup>

Thus against the background of these succession indexes, the husband of an *epikleros* could not be the legal and permanent inheritor of his wife's patrimony though its management and control would be transferred to him for the upkeep of the woman once she was married to him. But this was temporary, for he in turn, would have to hand over the property into the possession of a son born to them in the marriage after two years on attaining his majority to manage and control as the legitimate heir to his grandfather (Dem. 46.20).

Most importantly, in Athenian law the ordinary orphaned daughter and her brother were appointed a guardian or guardians, as the case may be, at the death of their father intestate; but the *epikleros* together with her patrimony had to be claimed at the court by her prospective guardian. This is the basis of the *epidikasia* for an *epikleros*. The claim for the property and the *epikleros* could be the result of one of three circumstances: (i) if her father died without adopting a son *inter vivos*, (ii) if the father died adopting a son by testament, (iii) if the father died without appointing a guardian for her *inter vivos*. Thus at the death of the father, if she had not yet been married already to one whom her father had adopted as his son, she became assignable or liable to adjudication (*epidikos*) together with her patrimony <sup>52</sup>. She was then assigned or adjudicated together with her

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<sup>51</sup> For an explanation of the situation see Is. 8.1, 3, 17, 30-34. It is noteworthy that this is probably the background of the law cited in Dem. 46.20. Cf. Is. 1.39, 40.

<sup>52</sup> See Is. 2.2; 6.4; 7.3; Dem. 44.46. Cf. Harrison, *The Law* cit., pp. 95, 156 nn. 2 and 3; J. Gould, *Law, Custom and Myth: Aspects of the Social Position of Women in Classical Athens*, JHS 100 (1980), pp. 38-59, esp. 43.

patrimony by court presided over by the archon. The adjudication, based on claims submitted to the archon, was made to the nearest kinsman of the deceased in a fixed order of precedence. This fixed order of precedence obviously reflected the same pattern as the one for claiming the inheritance of a man who died without any issue, as set out in the law cited in Dem. 43.51 on intestate succession.

One other situation that could make the *epikleros* assignable (*epidikos*) is if her successful claimant or guardian died while she was still a minor. Again, there is the question as to what the position could be if the successful claimant married her but died without having any children with her. These two latter situations, though rare in the sources, legally made the *epikleros* and her patrimony *epidikos* once more in Athenian law, and thus required fresh claims for the bequest and her. All these legal requirements and procedures, however, do not apply in the case of an ordinary female orphan with a brother whether or not the brother was a minor. Thus any argument intending to put the *epikleros* and the normal daughter on one and the same juridical footing would sound like a kind of sophistry, and an attempt to water down the unique socio-legal status of the *epikleros*.

In any case, a question worth addressing is: what if no kinsman claimed the poor *epikleros*? The answer to this question could be derived from the functions of the *epikleros* in Athenian social perspectives. Because of the patriarchal nature of ancient Greek society, and, particularly, the Athenian concern for the continuity of the paternal household, the *epikleros* was by nature and custom expected to fulfill three complementary functions in her father's household. First, as the only surviving child of her deceased father the *epikleros* was expected to retain her father's property in his family. Second, she also had to serve as the channel for transmitting her father's estate to a male heir born by her. Furthermore, it was her responsibility to prevent the extinction of her deceased father's lineage by getting a male child. These seemingly distinct but interlocking functions could successfully be performed by her only when she had been claimed and married.

It does seem that it was to prevent the possibility of her not being claimed or not being married at all as a poor *epikleros* that the laws quoted in Dem. 43.51 and 54, paraphrased in Is. 1.39, and the law cited in Dem. 43.75 were instituted. For if she was neither

claimed nor married to bear children her father's lineage would become extinct. This is because the father's household without male children would eventually be absorbed into that of his next of kin. But this was a situation which constituted not only a serious threat to the independent continuity of the households generation after generation by the eventual lack of male issue but also weakening the concentration tendencies of the *genos*<sup>53</sup>. Against the background of such familial and social considerations, it is significant that a situation when an *epikleros* was not at all claimed and married seems to be non-existent in the sources. In fact, there is evidence to suggest that even an *epikleros* with almost nothing to live on had her father's inheritance claimed in order to marry her on grounds of affinity, and to escape societal and legal sanctions<sup>54</sup>.

#### ADMINISTRATION OF ORPHAN'S PATRIMONY

With regard to the administration of the orphan's patrimony, especially that of the *epikleros*, Maffi maintains that the parents of the minor *epikleros* were entrusted with the administration of her patrimony<sup>55</sup>. It is, however, not clear whether it was the paternal relatives of the girl who administered her patrimony or her maternal ones. Again, we do not know whether the same people who managed and controlled her patrimony were her guardians during her minority, or her person was entrusted to some of her relatives for her upkeep while other kinsmen also administered her patrimony until her majority when she was claimed by her father's next of kin.

In the former case, the fundamental principle is that it was the kinsmen of the girl whether paternal or maternal, who administered her patrimony. In that case, the practice somehow reflects the general pattern in the Athenian situation, although in the case of Athens, it was most often the paternal relatives who took charge. In the latter case, however, if some of the girl's relatives administered her

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<sup>53</sup> Cf. D. Asheri, *Laws of Inheritance, Distribution of Land and Political Constitutions in Ancient Greece*, «Historia» 12 (1963), pp. 1-21, esp. 8.

<sup>54</sup> See Is. 1.39; Andok. 1.117-122.

<sup>55</sup> A. Maffi, *Il diritto di famiglia nel codice di Gortina*, Milano 1997, pp. 83-87.



patrimony while others took responsibility of her maintenance, then the practice was at variance with the situation or practice in Athens, though it would appear to be the custom in other Greek cities. For instance, Kharondas of the Greek city of Katane is said to have made laws for other Greek cities of Sicily and Italy as well as for his own city. According to Diodorus Siculus, Kharondas legislated that the orphan's estate be managed and controlled by the paternal uncles, while the maternal uncles took charge of her care.

The primary reasons for Kharondas' division of responsibilities to the orphan seem quite ingenuous. For one thing, the maternal uncles, having no share in the orphan's inheritance will not plot against him; for another, the paternal uncles who have a share in his fortune would not have the opportunity to plot against his life since he is not entrusted into their care. Moreover, since the paternal uncles could inherit the orphan's estate in the event of his death, they would manage the estate with greater care, hoping that they would succeed him if he died <sup>56</sup>.

The Athenians, however, did not separate the custody of an orphan's person from the administration of his patrimony. None the less, their practice of guardianship seems to reflect the principle of appointing close relatives as guardians of their orphans which the rules of Kharondas appear to have emphasised. A few cases readily come to mind. In 376/375 B.C., Demosthenes the elder made a will in which he appointed three guardians for his son and daughter, two of whom were his nephews (Dem. 27.4-5; 28.15). In Lysias 32, *Against Diogeiton*, the sole guardian appointed by Diodotos for his children was his own brother (Lys. 32.4-5). In Isaios, *On the Estate of Kleonymos*, Deinias is guardian of his brother's son, and when Deinias dies it is Kleonymos, the children's maternal uncle who takes over the sons and cares for them <sup>57</sup>. And in the case of an *epikleros*, it was always the nearest relative of the father who in law could

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<sup>56</sup> See Diod. Sic. 12.15; Arist. *Pol.* 2.9.5 (Penguin). Cf. H.F. Jolowicz, *The Wicked Guardian*, «JRS» 37 (1947), pp. 82-90, esp. 82, who is suspicious of the reason attributed to Kharondas that the separation of personal custody from the administration of a ward's property was motivated by fears for his safety. Cf. also F.E. Adcock, *Literary Tradition and Early Greek Code-makers*, «GRBS» 19 (1974), pp. 199-209; M. Gagarin, *Early Greek Law*, Berkeley 1986, p. 51 ff.; R. Sealey, *The Justice of the Greeks*, Michigan 1994, p. 25.

<sup>57</sup> Is. 1.9, 12, 28. For more examples of close relatives appointed as guardians see Dem. 40.6-7; Is. 2.3-5; 7.5-6, 41-42; 11.10 ff.; Lys. 19.8-9.

claim the property together with her (Dem. 43.51). Thus although the Athenians did no separate responsibility for the administration of the patrimony from the nurture and care of the orphan, whether or not the child was an *epikleros*, the pattern of having close relatives as guardians to manage the bequest and cater for the ordinary orphan or the *epikleros* seems to be the same in Athens as it was at Gortyn and in other Greek city-states. But although at Gortyn and Athens it was a kinsman who could marry the *epikleros*, the *epidikasia* at Athens did not imply a betrothal of the girl in marriage to the father's next of kin.

## CONCLUSIONS

I conclude, then, that the archon had no betrothal power in the Athenian family. The public procedure of *epidikasia* which he administered was thus not to sanction a marriage between an *epikleros* and her successful claimant. Rather, it was meant to validate and ratify the rightful relationship of the successful claimant to the deceased the bequeathed property and any *epikleros* that went with it. Any decision about her marriage with its attendant marriage procedures or rites, if she was a minor *epikleros* when she was claimed, did not take place until she had reached the recognised marriageable age. Even in the case of an adult *epikleros* who was not already married, it was only after she, together with her patrimony, had been successfully claimed and awarded to her successful claimant on grounds of affinity that her claimant could decide either to marry her himself if he so wished, or else give her away in marriage to someone else. In either case, the terms or conditions of the law quoted in Dem. 43.54 were mandatory if she was of the *thetic* class. Furthermore, marrying her off and dowering her from her patrimony were in fact obligatory duties even if she was of the wealthy class, if the successful claimant did not marry her himself.

It seems apparent also that the situation whereby a rich *epikleros* had been claimed without the successful claimant marrying her is non-existent in the sources. But the decision on her marriage, whether she was rich or poor, was discretionary on the part of the successful claimant, and the actual marriage ceremonies took place later. The

essential point is that it was not the person of the *epikleros per se* that was claimed at the *epidikasia*. On the contrary, it was the inheritance or heir. This entitled the claimant to the deceased's property and to the *epikleros* since both are inseparable procedurally, and therefore, neither could be claimed without the other; a title which should be established by proof of nearness of kin to the deceased. The claim was the same as that of a son adopted by testament by a man who had a daughter but no biological son. The claim of the adopted son at the *epidikasia* was the validation of the testament and not the acquisition of the *epikleros*. It is only when the claimant has been able to validate his testamentary adoption and had been certified by the court that he could enter into possession of the bequeathed estate and have the *epikleros* under his legal authority. But this does not constitute marriage there and then, especially in the case of a minor *epikleros* whose marital status is determined at her majority.

The *epidikasia*, thus, preceded the marriage of the *epikleros*. It was not a marriage rite but the procedure by which claim to the property and the *epikleros* was validated and confirmed. In fact, the procedure enabled the archon as chairman of the jury merely to make a solemn statement of the outcome of the evidence procedure, since normally this statement would be made by a third person, or a group of persons acting as umpires. After the legal procedure had been satisfied and the jury had confirmed the bequest on the next of kin be received both the property and the young *epikleros* (Dem. 43.51). He then could, as the manager of the estate and legal guardian of the girl, decide either to marry her himself at her majority or give her away in marriage to someone else and dower her accordingly. This latter stage of the *epikleros'* legal status is what the law implies in the statement, *if the nearest of kin does not wish to marry her, he shall give her away in marriage*, in Dem. 43.54. None the less, although the next of kin could marry her himself he could exercise this right or have the power of betrothal over her only after he had successfully claimed the property and her by proof of his nearness of kin to the deceased at the *epidikasia*. As a matter of fact, the next of kin had no right to marry the *epikleros* until the archon had adjudged her patrimony together with her to him<sup>58</sup>. On this

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<sup>58</sup> Dem. 46.22. Cf. D.M. Schaps, *Economic Rights of Women in Ancient Greece*, Edinburgh 1979, pp. 33, 125 n. 63.

point, I totally agree with Maffi who has pointed out in a letter to me that nobody could marry the *epikleros* without passing through the procedure of *epidikasia*<sup>59</sup>. In any case, the next of kin, as already argued, was not obliged to marry the girl; what he was legally obliged to do if he did not wish to marry her himself was to provide her with some other husband and a dowry as required by law.

It is conclusive, therefore, that a proof of the nearest kinship relationship for the award was the fundamental objective of the *epidikasia*. All references to claiming the hands of the *epikleros* in marriage by litigants in the orators are, therefore, mere rhetorical techniques meant to demonstrate their love for family ties in order to emphasise their kinship relationship to the deceased, the *epikleros* and her patrimony, and to give the indication that in law they could marry her<sup>60</sup>.

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<sup>59</sup> I believe that he means, «no next of kin», or «no adopted son», but not one to whom the next of kin, or the adopted son would give the *epikleros* in marriage if he would not marry her himself after the *epidikasia*. For in that case, the next of kin or the adopted son would have been exercising his betrothal power which would not require the executive fiat of the archon at an *epidikasia*.

<sup>60</sup> I should like to express my most sincere gratitude to Prof. D.M. MacDowell, who read the first draft of this paper in 2002, and made a number of useful comments. I wish to sincerely thank Prof. A. Maffi, also who has read all three versions of it and made equally useful criticisms and comments. Prof. Maffi kindly sent me his work which I have cited in n. 55, above, and his article titled *È esistita l'aferesi dell'epikleros?*, which appeared in *Symposion 1988*, to broaden my horizon on the subject. The collective criticisms, comments and suggestions of both scholars made me rethink some of the issues I had raised in my previous versions. I, however, take full responsibility for the opinions expressed here in this final version. Unless otherwise stated, the translations in this article are from the Loeb Classical Library series with some modifications. I follow the standard transliteration of Greek words and phrases but every other emphasis in the text except titles of works and periodicals is mine.