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Articoli

Varie

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Two Constitutions, an Omitted Justinian Code and a Thematic Codification. Prohibiting the Alienation of Ecclesiastical Immovable Property: Some Legal Complexities [*]

ABSTRACT – The present article focuses on two constitutions, and one Justinian Novel, all dealing with a prohibition on the alienation of ecclesiastical immovable property. The two constitutions, the first of which was issued by emperor Leo I in 470, the second by emperor Anastasius between 491 and 518, were both incorporated into Justinian's *Codex repetitae praelectionis* (issued in 534), viz. as C.I. 1.2.14 (Leo I) and C.I. 1.2.17 (Anastasius) resp. In the preface to his Nov. 7 – promulgated 15 April 535 – the emperor Justinian explicitly refers to both constitutions, but completely ignores their incorporation into the Justinian Code. The article investigates this curious state of affairs, and explains how Justinian solved this apparent enigma. Finally, the article concludes that the ensemble consisting of C.I. 1.2.14 and Nov. 7 make up a thematical Codification, restricted to the provisions of the ban on the alienation of ecclesiastical immovable property as laid down in Leo's constitution and Justinian's Novel.

1. In the later fifth- and early sixth centuries, three Byzantine Emperors issued laws pertaining to the alienation of ecclesiastical immovable property. It concerns Leo I who ruled from 457-474, Anastasius who ruled from 491-518, and finally

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Justinian, whose regnal years stretch from 527-565 [1].

2. In the year 470, the emperor(s) Leo I (and Anthemius) promulgated a constitution which strictly prohibited the alienation of ecclesiastical immovable property belonging to Great Church of Constantinople [2]. It concerns C.I. 1.2.14 pr.:

> Impp. Leo et Anthemius AA. Armasio pp. **pr**. Iubemus nulli posthac archiepiscopo in hac urbe regia sacrosanctae ecclesiae praesidenti, nulli oeconomo, cui res ecclesiastica gubernanda mandatur, esse facultatem fundos vel praedia urbana seu rustica, res postremo immobiles aut in his praediis colonos vel mancipia constituta aut annonas civiles cuiuscumque suprema vel superstitis voluntate ad religiosam ecclesiam devolutas sub cuiuscumque alienationis specie ad quamcumque transferre personam, sed ea praedia dividere quidem, colere augere et ampliare nec ulli isdem praediis audere cedere. (...) D. Constantinopoli Iordane et Severo conss. [470] [3].

3. In the course of his reign, the emperor Anastasius issued a constitution [4] in which he explicitly confirmed laws in force pertaining to the Great Church of Constantinople, while adding that charitable institutions – also styled as holy or religious houses – were to be included. The Great Church had taken the financial

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[1] On the laws issued by Leo I, Anastasius and Justinian, and dealt with in the present article, in general, cf. e.g. M.K. FARAG, *What Makes a Church Sacred? Legal and Ritual Perspectives from Late Antiquity*, (Transformation of the Classical Heritage, 63), Oakland (California), 2021, p. 47-49 with notes 37-47 on page 222; P. SÁRY, *The Property Rights of the Church in the Roman Empire*, in *Zbornik Pravnog fakulteta u Zagrebu*, 73/4, 2023, p. 693-720 (711-713).

[2] However, the constitution did allow the Church to grant the usufruct of a piece of ecclesiastical property for a specific term, or for the lifetime of the recipient, on the condition that this recipient should provide the Church with title to full ownership of property of the same value; C.I. 1.2.14.9.

[3] Transl. J.N. DILLON, in B.W. FRIER (ed.), *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text. Based on a Translation by Justice Fred H. Blume. Volume I: Introductory Matter and Books I-III*, Cambridge, 2016, p. 49-51: '*Emperors Leo and Anthemius Augusti to Armasius, Praetorian Prefect.* pr. We order that no archbishop presiding over a holy church in This Imperial City, no steward to whom the administration of church property has been entrusted, shall hereafter have the power to transfer to any person, by any form of conveyance, any farms or urban or rural estates, or indeed any immovable property, or the tenants (*coloni*) or slaves upon these lands, or any civic bread rations (*annonae civiles*), which have devolved to the Holy Church by the last will of any man, or by the will of one who survives him. They may, indeed, divide, cultivate, increase, and extend such estates yet not dare to yield them to anyone. (...). *Given at Constantinople, in the consulship of Jordanes and Severus* (470)'.

[4] An exact date of the constitution (C.I. 1.2.17) is not known, because it lacks a subscription. This is hardly surprising, because the Latin Codex manuscripts do not hand down Greek constitutions (*Graeca non leguntur*...). The Greek text of the constitution was reassembled from various sources: the Nomocanon XIV titulorum and the Collectio tripartita.

management of these houses upon itself. Privileges of the Church and of the dependent institutions remained untouched. Anastasius then ruled that the alienation of immovable property belonging to the charitable institutions was void, unless if some business would come to light that was indispensible or useful to the institutions: in that case, a sale or security arrangement (hypothec) or exchange or *emphyteusis* (long-term lease) of such property was allowed, because it was deemed advantageous:

> Αὐτοκράτωρ Ἀναστάσιος Α. **pr**. ... Θεσπίζομεν τὰ ἐπὶ τῇ ἁγιωτάτῃ μεγάλῃ ἐκκλησίᾳ τῆσδε τῆς βασιλίδος πόλεως (ᾗ συνυπάγεσθαι προσήκει καὶ τοὺς ἁγιωτάτους οἴκους, ὧν αὐτὴ τά τε πράγματα καὶ τὴν τῶν καλουμένων διαρίων καὶ λοιπῶν δαπανημάτων εἰς ἑαυτὴν ἀνεδέξατο χορηγίαν) ὁρισθέντα καὶ κρατήσαντα μένειν ἐφ' ἑαυτῶν ἀσάλευτα καὶ ἄτρωτα κατὰ πάντα τρόπον φυλαττόμενα· βέβαια δὲ εἶναι καὶ πάντα τὰ προνόμια τὰ τῇ αὐτῇ μεγάλῃ ἐκκλησίᾳ καὶ τῷ θρόνῳ ταύτης τῆς βασιλίδος πόλεως καθ' οἱονδήποτε χρόνον ἢ τρόπον ὑπάρξαντα καὶ ἐποφειλόμενα. **1.** Θεσπίζομεν, ὥστε πᾶσαν ἐκποίησιν πραγμάτων ἀκινήτων ἢ πολιτικῶν σιτηρεσίων τοῖς σεβασμίοις οἴκοις διαφερόντων ἢ διοισόντων καθ' οἱονδήποτε τρόπον γινομένην ἢ μελετωμένην ἢ ἐπινοεῖσθαι δυναμένην σχολάζειν· πλὴν εἰ μήπου χρείας τινὸς ἀναγκαίας καὶ ἐπωφελοῦς τοῖς αὐτοῖς σεβασμίοις οἴκοις ἀνακυπτούσης λυσιτελὴς εἴη τούτοις ἡ πρᾶσις τοῦ τοιούτου πράγματος ἢ ὑποθήκη ἢ ἀνταλλαγὴ ἢ διηνεκὴς ἐμφύτευσις, (...). [491-518] [5].

Sofar, there is no legal complexity yet. Because Anastasius explicitly confirmed laws in force pertaining to the Great Church of Constantinople, he appears to have endorsed Leo's constitution that prohibited the alienation of ecclesiastical immovable property belonging to Great Church of Constantinople. However, under certain conditions Anastasius *allowed* the alienation of immovable property belonging to charitable institutions dependent on the Great Church.

4. On 15 April 535, it was the emperor Justinian who promulgated a constitution strictly forbidding the alienation of ecclesiastical immovable property: Nov.

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[5] C.I. 1.2.17. pr.-1. Transl. DILLON in FRIER, *The Codex of Justinian,* Vol. I (n. 3), p. 57: '*Emperor Anastasius Augustus.* **pr**. We decree that the provisions established and in force concerning the Great and Most Holy Church of This Imperial City – under which the holy houses should also be comprehended, the business of which and payment of so-called day-wages *(diaria)* and other expenses the Church has taken upon itself – shall remain in their present state unshaken and intact, protected in every way. The privileges that at any time or in any manner belonged or are due to the same Great Church and See of This Imperial City shall stand firm. **1.** We decree that any alienation of immovable property or civic bread rations that do or shall belong to the religious houses, regardless of how it should be made, attempted, or devised, is void, unless, if some business should emerge that is indispensable or useful to the aforementioned holy houses, a sale or security arrangement or exchange or *emphyteusis* (long-term lease) of such property should seem advantageous. (491-518)'.

7 [6]. In the preamble of his Novel, Justinian explicitly refers to both constitutions mentioned up to now.

Justinian severely castigated the law issued by Anastasius, putting special emphasis on the fact that it related only to the archpriesthood and the diocese subject to the patriarch of Constantinople, but disregarded all other episcopal Sees and ecclesiastical officials. Thus, Justinian censured Anastasius's constitution because its effect was restricted to the highest priesthood, and in particular because of its local validity; however, he failed to mention that Anastasius under certain conditions *allowed* the alienation of immovable property belonging to charitable institutions.

> Ἀναστασίῳ δὲ τῷ τῆς εὐσεβοῦς λήξεως γέγραπταί τις περὶ τῶν τοιούτων νόμος, οὔτε ὅμοιος τῷ προτέρῳ παντοίως τε ἐλλιπής. ἐκχεθεὶς γὰρ καὶ ἐπὶ τοὺς ἔξω τόπους οὐδὲν ἧττον ἔμεινεν ἀτελής, πρὸς μόνην τὴν ἀρχιερωσύνην καὶ τὴν διοίκησιν ὁρῶν τὴν τεταγμένην ὑπὸ τὸν μακαριώτατον πατριάρχην τῆς βασιλίδος ταύτης καὶ εὐδαίμονος πόλεως, τοὺς δὲ ἄλλους ἅπαντας μὴ περιεργαζόμενος θρόνους· καίτοιγε εἴπερ ἄξιον ἐπανορθώσεως εἶναι τὸ πρᾶγμα ᾤετο, κατὰ ποίαν πρόφασιν τὰ μὲν ἐπηνώρθου, τὰ δὲ ἀκόσμητα κατελίμπανεν; (...), ἀτελῆ τε καθεστῶτα καὶ τόπῳ περικλειόμενον, ἀλλ' οὐ γενικὸν ἐν νόμοις ὄντα οὐδέ τι σπουδαῖον εἰσαγαγόντα [7].

With regard to the constitution issued by Leo I (and Anthemius), Justinian was far less severe in his judgement. In actual fact, his only point of real criticism was that Leo's law had merely local validity, because its scope of application was restricted to the Great Church of Constantinople:

> Λέοντι μὲν οὖν τῷ τῆς εὐσεβοῦς λήξεως, ὃς δὴ μετὰ Κωνσταντῖνον τὸν τῆς εὐσεβοῦς μνήμης καὶ τὸν τῆς χριστιανικῆς πίστεως ἐν βασιλεῦσιν ἀρχηγέτην ηὔξησέ τε καὶ κατεστήσατο τὴν τῶν ἁγιωτάτων ἐκκλησιῶν τιμήν τε καὶ κατάστασιν, γέγραπται νόμος περὶ τῶν ἐκκλησιαστικῶν ἐκποιήσεων, μόνῃ περικεκλεισμένος τῇ κατὰ τὴν εὐδαίμονα ταύτην πόλιν ἁγιωτάτῃ μεγάλῃ ἐκκλησίᾳ. Καὶ ἐπαινοῦμέν γε τὰ πλείω τούτου τοῦ νόμου μετὰ πάσης σφοδρότητός τε καὶ θεοφιλίας τεθειμένα, ἀλλὰ τῷ γε μὴ γενικῶς αὐτὸν κεῖσθαι

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[6] Date of Nov. 7: SK (= R. SCHÖLL / G. KROLL (edd.), *Novellae*, (Corpus iuris civilis, editio stereotypa secunda. Volumen III), Berolini 1895 (many reprints, most recently Cambridge, 2014)), p. 64/4: *Dat. XVII k. Mai. CP. Belisario v.c. cons*. (= 15 April 535).

[7] Nov. 7 praef. (SK 49/1-14). Transl. D.J.D. MILLER / P. SARRIS, *The Novels of Justinian. A Complete Annotated English Translation*, Vol. I, Cambridge, 2018, p. 112: 'A law laid down on such matters by Anastasius of pious destiny is, unlike its predecessor, unsatisfactory in every way. Disseminated though it was to outlying regions as well, it nevertheless remained imperfect: it has regard only to the highest priesthood, and to the diocese under the direction of the most holy patriarch of this sovereign and fortunate city, with no concern for any other high authorities. Yet, if he thought the matter needed correction, what reason was there for his correcting a part of it while leaving the rest in disorder? (...) It was imperfect, restricted in its area, had no general place among laws, and introduced nothing of importance'.

> κατὰ πάντων ἐπισκήπτομεν, δεῖσθαι μέντοι καὶ αὐτόν τινος ἐπανορθώσεως πεπιστεύκαμεν [8].

In order to remedy this situation and do justice to his own objections, Justinian intended to come up with an all-embracing set of statutory regulations regarding ecclesiastical immovable property, the property of the charitable institutions included:

> Ταῦτα οὖν ἡμεῖς ἐπανορθοῦντες ἅπαντα μίαν ᾠήθημεν χρῆναι νομοθεσίαν ἐπιθεῖναι πᾶσι τοῖς τῶν ἁγιωτάτων ἐκκλησιῶν καὶ ξενώνων καὶ νοσοκομείων καὶ πτωχείων καὶ μοναστηρίων καὶ βρεφοτροφείων καὶ γεροντοκομείων καὶ παντὸς ἱερατικοῦ συστήματος πράγμασι, (...) [9].

5. It is at this point, that the legal complexities really commence. For, both constitutions referred to in the preamble of Nov. 7 had been adopted into Justinian's *Codex repetitae praelectionis* which saw the light of day on 16 November 534. Leo's constitution dealing with the ban on the alienation of ecclesiastical property occurs in book 1 of the Code as C.I. 1.2.14, Anastasius's occurs in the same title as C.I. 1.2.17. In the preface to his Nov. 7, Justinian completely ignores this.

It is certainly true that in the Justinian Novels, direct references to the Code – mentioning book and title – are very rare indeed. Professore Puliatti has found only two occurrences, viz. in Nov. 2.3 pr. (SK 14/14-22; 16 March 535) and Nov. 37.9 (SK 245/22-23; 1 August 535) [10]. Nevertheless, the references to the laws issued by Leo and Anastasius in the preamble of Nov. 7 are distinctly curious, because Justinian omits any direct allusion to his own Code, but does describe the

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[8] Nov. 7 praef. (SK 48/25-36). Transl. MILLER / SARRIS, *The Novels*, Vol. I (n. 7), p. 112: 'After the first sovereign to champion the Christian faith, Constantine of pious memory, it was Leo of pious destiny who enhanced and established the honour and position of the most holy churches; and there is a law laid down by him on ecclesiastical alienations, which is confined solely to the most holy great church in this fortunate city. We applaud most of the provisions of this law, laid down as it is with all due forcefulness and religious feeling; however, a fault we find is that it is not so framed as to apply generally, overall, and we have become convinced that it, too, needs some correction'.

[9] Nov. 7 praef. (SK 49/14-19). Transl. MILLER / SARRIS, *The Novels*, Vol. I (n. 7), p. 112: 'We have thought it necessary to rectify this situation by bringing this whole subject under a single piece of legislation, applying to all property that belongs to most holy churches, hospices, hospitals, almshouses, monasteries, children's homes, old people's homes and every institution of a sacred kind'.

[10] Cf. S. PULIATTI, *'Eas quas postea promulgavimus constitutiones'. Sui rapporti Novellae-Codex nella prospettiva Giustinianea*, in *Novellae constitutiones. L'ultima legislazione di Giustiniano tra Oriente e Occidente da Triboniano a Savigny. Atti del Convegno Internazionale, Teramo, 30-31 ottobre 2009* (*cur*. L. LOSCHIAVO, G. MANCINI, C. VANO), Napoli-Roma, 2011, p. 1-24 (12 with note 29); Puliatti discusses Nov. 7 praef. with its references to the constitutions of Leo and Anastasius briefly on the pages 12-14.

provisions of Leo's law in great detail. The question presents itself why Justinian did so.

The first reason is rather self-evident. It stands to reason that on 15 April 535 (date of issue of Nov. 7) he had no intention whatsoever to incriminate himself and criticize his own work: the *Codex repetitae praelectionis* which had been promulgated just a few months before, on 16 November 534.

A second reason is perhaps less obvious, but all the more legal in nature. By ignoring the second edition of the Code, Justinian could also ignore its scope of application and problems connected with it. The incorporation of Leo's law and that of Anastasius into the Code implied that both constitutions were exclusive and universally valid, in accordance with the conclusions of Professor Jan Lokin [11]. One might even argue that the adoption of both constitutions into the Code would have rendered the promulgation of Nov. 7 to a certain extent unnecessary. Leo's law from 470 with its local validity (just the Great Church of Constantinople), and Anastasius's law, issued between 491 and 518, with a somewhat more extensive local validity (viz. the complete diocese of the patriarch of Constantinople) became universally valid by the promulgation of the second Code in 534. So, exactly what is the problem?

The real problem is the dating of the two constitutions in combination with the *lex posterior derogat legi priori* rule that applied within the individual titles in the *Codex repetitae praelectionis*. The *lex posterior* rule is alluded to in const. *Haec* – issued 13 February 528, as the first of the introductory constitutions to Justinian's first Code, the *Novus Codex* of 529 –, in the sense how to find the most recent applicable constitution in any given title of the *Codex*:

> ..., ita tamen, ut ordo temporum earundem constitutionum non solum ex adiectis diebus et consulibus, sed etiam ex ipsa compositione earum clarescat, primis quidem in primo loco, posterioribus vero in secundo ponendis et, si quae earum sine die et consule in veteribus codicibus vel in his, in quibus novellae constitutiones receptae sunt, inveniantur, ita his ponendis nullaque dubietate super generali earum robore ex hoc orienda, ... [12]

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[11] J.H.A. LOKIN, *Codifications of Late Antiquity: Exclusive and Universal* (*edd*. TH.E. VAN BOCHOVE, F. BRANDSMA, A.-M. DRUMMOND, P.E.M.S. LOKIN-SASSEN), Groningen-Den Haag, 2023, p. 227-229 and p. 233-234.

[12] Const. *Haec*, § 2. Transl. DILLON and FRIER, in FRIER, *The Codex of Justinian*, Vol. I (n. 3), p. 5: '– provided that the chronological order of these constitutions shall appear clearly not only by indication of days and consuls (their dates), but also by the arrangement itself, the older constitutions being put first with the later ones following. And if any constitutions without day or consul are discovered in the ancient Codices or where the new constitutions are collected, they too shall be inserted, and no doubt as to their general force shall arise from this fact, ...'.

Even though both the law of Leo (C.I. 1.2.14) and that of Anastasius (C.I. 1.2.17) lack an exact date, it is safe to assume that in the original *Codex repetitae praelectionis* of 534 both constitutions occurred within the same title, and that Anastasius's law chronologically followed that of Leo, being more recent than Leo's. [13] Now, as a result of the *lex posterior* rule Anastasius's law took precedence over Leo's law, because it was of a more recent date than Leo's. We have already seen that Justinian applauded the law of Leo, but clearly abhorred that of Anastasius. Because of this, the abrogation of Leo's law by that of Anastasius as a result of the *lex posterior* rule was not exactly something that Justinian could condone.

In order to avoid having to criticize his own work – the *Codex repetitae praelectionis* –, Justinian was forced to level his criticism directly at the emperors Leo and Anastasius. By being compelled to ignore the second edition of the Code, Justinian had to depart from the legal reality of the later fifth century: two constitutions dealing with the prohibition on the alienation of ecclesiastical property. The first of these was Leo's law, which had only local validity, but was otherwise very much acceptable to Justinian. The second law was that of Anastasius, which did have a somewhat more extensive scope of applicability, but was otherwise apparently abhorrent to Justinian. What he had to do in order to mend this situation and adapt it to his legal preferences without impairing his *Codex repetitae praelectionis*, was abrogating Anastasius's law, and combining his own law (Nov. 7) with that of Leo, providing this ensemble with universal and perpetual validity. And that is exactly what Justinian did. Regarding the abrogation of Anastasius's law we read in the preamble of Nov. 7:

> Ὥστε αὐτὸν καὶ πεπαῦσθαι τοῦ λοιποῦ θεσπίζομεν, ἀτελῆ τε καθεστῶτα καὶ τόπῳ περικλειόμενον, ἀλλ' οὐ γενικὸν ἐν νόμοις ὄντα οὐδέ τι σπουδαῖον εἰσαγαγόντα [14].

And what Justinian did with the constitution issued by Leo in combination with his own Nov. 7 – declaring this ensemble universally and perpetually valid –, appears from three separate passages which are here combined:

> ..., καὶ τοῦτον τὸν νόμον τῇ Λέοντος τοῦ τῆς εὐσεβοῦς λήξεως διατάξει προσθεῖναι, πρότερον αὐτῆς ἐν βραχεῖ τὴν νομοθεσίαν ἐκτιθέμενοι οὕτω τε ἅπαν τὸ λοιπὸν προσυφαίνοντες. ... ἀλλὰ πάντας πανταχοῦ τοὺς ἱερεῖς τῆς τοιαύτης ἐκποιήσεως εἴργομεν, ταῖς ποιναῖς ὑποκειμένους, αἷς ἡ Λέοντος τοῦ τῆς εὐσεβοῦς λήξεως ἐχρήσατο διάταξις. ἐκείνην γὰρ κατὰ πάντων κρατεῖν καὶ κυρίαν εἶναι θεσπίζομεν, ... Οὗτος ἡμῖν ἐπὶ τῆς τῶν

[13] For all the details, cf. TH.E. VAN BOCHOVE, *Universal validity without exclusivity? Some observations on Justinian's Novel 7*, in *Subseciva Groningana*, 11, 2024, p. 137-160 (144-147).

[14] Nov. 7 praef. (SK 49/11-14). Transl. MILLER / SARRIS, *The Novels*, Vol. I (n. 7), p. 112: 'We thus decree that that law is, for the future, to stand repealed. It was imperfect, restricted in its area, had no general place among laws, and introduced nothing of importance'.

> ἐκκλησιαστικῶν ἢ ὅλως πτωχικῶν πραγμάτων ἐκποιήσεως ἀποκείσθω νόμος, τῇ Λέοντος μὲν τοῦ τῆς εὐσεβοῦς λήξεως εὐσεβῶς ἑπόμενος διατάξει, ἀλλ' οὐ τὸ μὲν ἰώμενος, τὸ δὲ ἀθεράπευτον καταλιμπάνων. ἀλλ' ἐπὶ πάσης τῆς γῆς, ἣν ὁ Ῥωμαίων ἐπέχει νόμος καὶ ὁ τῆς καθολικῆς ἐκκλησίας θεσμός, οὗτος ἐκτετάσθω, καὶ ὁριζέτω τὰ οἰκεῖα καὶ κρατείτω διηνεκῶς, (...) [15].

6. [16] As if giving the ensemble of Leo's constitution and his own Nov. 7 universal and perpetual validity [17] was not enough, Justinian went one step further, though he may have done so inadvertently. He may have created what can effectively be styled as a thematic codification. When applied to Late Antiquity, the use of the term 'codification' is of course anachronistic, as the term originated in the age of the Enlightenment: it was first coined by Jeremy Bentham (1748-1832) [18]. It is, however, a matter of definition. It is, for instance, quite possible to refer to the ensemble of Justinian's Institutes, Digest, and Code in terms of 'codification', if this concept is understood to meet the following three requirements:

(1) The law concerned must be written law, *ius ex scripto*. The Institutes, the Digest, and the Code were all three officially promulgated in written form.

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[15] Nov. 7 praef. (SK 49/19-23); Nov. 7.1 (SK 52/27-31); Nov. 7 epil. (SK 62/25-32). Transl. MILLER / SARRIS, *The Novels*, Vol. I (n. 7), p. 112, 116, and 124-125: 'This law (viz. Nov. 7) is to supplement the constitution of Leo of pious destiny, whose terms we shall first outline in brief; that done, we shall go on to interweave all the rest with it. (...). (...) We restrain all priests everywhere from making any such alienation, on pain of the penalties employed in the constitution of Leo of pious destiny. That constitution, we decree, is to be in force, and valid in all respects; (...). (...) That is the law (Nov. 7) to be put in place by us about alienation of the property of the church, or of charitable foundations in general. It piously follows the constitution of Leo of pious destiny, but without leaving one aspect untreated while remedying another. It is to extend over the entire territory covered by Roman law and the jurisdiction of the catholic church. It is to be decisive in its field, and to be in force in perpetuity, (...)'.

[16] For the following section in its entirety, cf. VAN BOCHOVE, *Universal validity without exclusivity?* (n. 13), p. 137-138, 147-151 and 153-155.

[17] The emperor Justinian's statement regarding perpetual validity is to be taken *cum grano salis*. Only a very short time after the promulgation of his Nov. 7, Justinian was forced to modify and relax the strict prohibition on the alienation of ecclesiastical properties, due to practical problems. The emperor did so by issuing four Novels – Nov. 46 (536), 54 (537), 55 (537) and 67 (538) – containing amendments to Nov. 7. It was only in 544 that Justinian came up with a new comprehensive law concerning the alienation of ecclesiastical property, by promulgating his Nov. 120; for all this, cf. FARAG, *What Makes a Church Sacred?* (n. 1), p. 49-50 with notes 51-55 on page 223; SÁRY, *The Property Rights of the Church* (n. 1), p. 712-713. See also N. VAN DER WAL, *Manuale Novellarum Justiniani. Aperçu systématique du contenu des Novelles de Justinien*, Groningen, 1998², p. 226-238 (= *Table des textes cités. Novelles de Justinien. a: La Collection des 168 Novelles*): 230 (Nov. 46), 231 (Novv. 54, 55 and 67), and finally 234-235 (Nov. 120).

[18] On this, cf. e.g. the references by F. BRANDSMA, *Preface*, in LOKIN, *Codifications of Late Antiquity* (n. 11), VII.

(2) There must be a government exercising authority over its subjects. In the case at hand it is Justinian who ruled his subjects as Roman emperor of an undivided Roman empire, or had at least the ambition to do so.
(3) The law concerned must be comprehensive. This comprehensiveness or completeness is brought about by a decree of the government granting the law concerned exclusivity. Declaring a law exclusively valid automatically implies the formal abrogation of all provisions and rulings relating to the same subject-matter issued previously. The Institutes, the Digest, and the Code have all been provided with an exclusivity clause [19]. In actual fact, it may be argued that it is exclusivity that defines a codification: generally speaking, statutes (constitutions) are issued in written form and promulgated by a government exercising authority over its subjects. It is the act of incorporating a law dealing with any given subject into a larger compilation and at the same time declaring that compilation exclusively valid, thereby rendering all previous legislation on the subject inoperative – thus, formal abrogation – that makes up the decisive factor in a codification process. With regard to the ensemble of Leo's constitution and Nov. 7, it comes down to the question if the Novel contains an exclusivity clause.

An important passage at the very end of the epilogue of Nov. 7 sheds light on this issue. It reads:

> Εἰ δέ τι περὶ μισθώσεων ἐκκλησιαστικῶν πραγμάτων ἢ καὶ ἐφ' ἑτέροις κεφαλαίοις ἐνομοθετήσαμεν ἢ καὶ παρὰ τῶν πρὸ ἡμῶν νενομοθέτηται, μενέτω τοῦτο ἐπὶ τῆς οἰκείας ἰσχύος, οὐδὲν ἀπὸ τῆς παρούσης θείας ἡμῶν διατάξεως καινιζόμενον. τὰ ἄλλα γὰρ πάντα μένειν ἐπὶ τῶν οἰκείων ὅρων ἐῶμεν, πλὴν εἰ μή τι περὶ τούτων ἔχοι, ἅπερ ἐνταῦθα διετάξαμεν· ἀρκοῦντος ἀντὶ πάντων τούτου τοῦ νόμου πρὸς τῷ παρὰ Λέοντος τοῦ τῆς εὐσεβοῦς λήξεως γενομένῳ πᾶσαν κατὰ τῶν πτωχικῶν πραγμάτων ἀνελεῖν ἐκποιήσεως πρόφασιν. [20]

Here, we are informed that any legislation of Justinian or his predecessors on the letting for hire (μίσθωσις) of ecclesiastical property, or on other subjects, was to retain its own validity, without being altered in any way by Nov. 7: Εἰ δέ τι περὶ

[19] Regarding the above definition of the concept of 'codification' including its three requirements, I am following J.H.A. LOKIN / W.J. ZWALVE / C.J.H. JANSEN, *Hoofdstukken uit de Europese Codificatie-geschiedenis*, Den Haag, 2020[5] (repr. forthcoming), p. 21-42, in particular 21-24.

[20] Nov. 7 epil. (SK 63/20-30). Transl. MILLER / SARRIS, *The Novels* (n. 7), p. 125: 'Any legislation of ours or of our predecessors on renting ecclesiastical property, or under other heads, is to remain in its own force, unaltered by our present divine constitution. We allow all its other provisions to stand, within their own sphere, but not anything it contains on the subjects of our present constitution; this law suffices, in addition to that made by Leo of pious destiny, in place of all, to abolish every pretext for alienating property of charitable foundations'.

μισθώσεων ἐκκλησιαστικῶν πραγμάτων ἢ καὶ ἐφ' ἑτέροις κεφαλαίοις ἐνομοθετήσαμεν ἢ καὶ παρὰ τῶν πρὸ ἡμῶν νενομοθέτηται, μενέτω τοῦτο ἐπὶ τῆς οἰκείας ἰσχύος, οὐδὲν ἀπὸ τῆς παρούσης θείας ἡμῶν διατάξεως καινιζόμενον. The emperor Justinian allowed all the other provisions of his legislation to remain within their own boundaries of application – τὰ ἄλλα γὰρ πάντα μένειν ἐπὶ τῶν οἰκείων ὅρων ἐῶμεν –, unless they contained a ruling on the issues dealt with in Nov. 7: πλὴν εἰ μή τι περὶ τούτων ἔχοι, ἅπερ ἐνταῦθα διετάξαμεν. The emperor declares explicitly that this present law, in combination with that issued by Leo, suffices in place of all the others to remove every pretext for alienation to the detriment of the property of poorhouses (charitable foundations, churches apparently included): ἀρκοῦντος ἀντὶ πάντων τούτου τοῦ νόμου πρὸς τῷ παρὰ Λέοντος τοῦ τῆς εὐσεβοῦς λήξεως γενομένῳ πᾶσαν κατὰ τῶν πτωχικῶν πραγμάτων ἀνελεῖν ἐκποιήσεως πρόφασιν.

What all this comes down to is exclusivity *tout court*. Justinian left the legal validity of his own laws (viz. his Codification consisting of the Institutes, the Digest and the Code, and the Novels issued until 15 April 535), as well as the laws of his predecessors (incorporated into the *Codex repetitae praelectionis*) completely intact, except where all those laws contained rulings dealing with the subject matter of Nov. 7 in combination with Leo's law. If this was the case, those particular rulings could no longer be consulted: in issues of ecclesiastical immovable property Leo's law in combination with Justinian's own Nov. 7 was the only applicable law. In other words: the ensemble of Leo's law and Nov. 7 excluded all other rulings on (the alienation of) ecclesiastical immovable property issued previously. The ensemble of Leo's law and Justinian's Nov. 7 can be regarded as a thematic codification, a codification of limited dimensions: it was restricted to the subject matter dealt with in Leo's law combined with Nov. 7.