THE PROPERTY RIGHTS OF THE CHURCH IN THE ROMAN EMPIRE

*Prof. Dr. Pál Sáry**

UDK: 347.232:27-9(37)
348:347.232(37)
34(37)
DOI: 10.3935/zpfz.73.4.03
Pregledni znanstveni rad
Primljeno: siječanj 2023.

The present paper deals with the legal capacity and especially the property rights of the growing Christian communities and church institutions within the Roman Empire from the beginning to the Justinianic era. In the beginning, the believers' charitable donations became the property of the bishops. Later, when the local Christian communities became legal persons, the property of the bishops was separated from the property of the congregations. The local churches could already own real estate before 313. After 313, the legal capacity of the Catholic congregations was confirmed. Later, following the example of local churches, monasteries and finally charitable institutions also became legal entities. Charitable houses were also personal associations and not foundations; independent foundations – similarly to the rules of classical Roman law – did not exist in Justinianic law. The edicts of the Christian emperors greatly facilitated the acquisition of property by local churches, monasteries and charitable institutions. Furthermore, a number of legal rules were made for the special protection of ecclesiastical property.

Key words: Roman law; ecclesiastical juridical persons; charitable donations; pious wills; prohibition of alienation

* Pál Sáry, Ph. D., Professor, Faculty of Law, University of Miskolc, 3515 Miskolc, Hungary; pal.sary@uni-miskolc.hu;
ORCID ID: orcid.org/0000-0003-0524-8585

1. INTRODUCTION

From the beginning, the church needed material goods to function. A fund had to be created from which the needy could be supported. There was a need for plots of land on which churches could be built for local congregations. The livelihood of the clergy had to be taken care of. Later, when monasticism began to spread, monasteries had to be built, which had to be maintained, and the livelihood of the monks had to be ensured. With the institutionalization of the church's charitable activities, houses had to be built for the poor, orphans and other needy people, in which service staff worked; the construction and maintenance of these houses also required constant financial resources. In the course of this development process, more and more questions of property rights appeared, which were closely related to the question of the legal personality of church institutions.

2. FROM THE BEGINNING TO 313

2.1. Church real estate

Under the document traditionally known as the Edict of Milan, places (*loci*) previously used by Christians for religious or other purposes and confiscated for the imperial treasury had to be returned to the Christians. According to the text of the edict, both places previously owned by some Christian believers and those formerly owned by Christian congregations had to be restored.[1]

The fact that in the first centuries Christians gathered in the larger private houses of richer believers for common worship is well known from many sources.[2] There is nothing surprising about this. What is surprising is that, accor-

[1] This famous edict (which was, in fact, a mandate) reported by Lactantius (*De mortibus persecutorum* 48) and Eusebius (*Historia ecclesiastica* 10,5,2–14) was issued by Licinius on June 13, 313 in Nicomedeia based on the decisions made at the February conference in Mediolanum. Shortly before the issuance of the edict, Constantine instructed Anulinus, *proconsul* of Africa, to return the goods confiscated from the local Christians: this letter indicates that a decision had already been made on this issue (Eus. *Hist. eccl.* 10,5,15–17). Around May 313 – shortly before his suicide – Maximinus Daia, who was defeated by Licinius, also issued an edict of tolerance, which also stated that the houses and lands confiscated from Christians should be returned to them (Eus. *Hist. eccl.* 9,10,11). For a good overview of the chronological issues of the period, see Mitchell, S., *Maximinus and the Christians in A.D. 312: A New Latin Inscription*, The Journal of Roman Studies, *vol*. 78, 1988, pp. 111–116.

[2] We can read about this custom in many places in the New Testament (Acts 2,46;

ding to the edict, before the outbreak of the persecution of Diocletian, there was real estate that belonged to congregations. The Christian congregations therefore became legal persons during the third century. What sources support this finding?

At the time of the persecutions, Christian congregations obviously could not have legal personality. This follows directly from the fact that Christianity was not one of the permitted religions (*religiones licitae*), and Christians were not entitled to the right of assembly (*ius coeundi*). Celsus, the great pagan philosopher of the second century, accused Christians primarily of entering "into secret associations with each other contrary to law".[3] Tertullian also admitted that church meetings were contrary to *senatus consulta* and *principum mandata*.[4]

This unfavourable situation changed during the reign of Severus Alexander (222–235). According to the *Historia Augusta*, the emperor of Syrian descent did not allow himself to be worshipped as a god[5], did not disturb Christians[6], took many principles and thoughts from them[7], and "also wished to build a temple to Christ and give him a place among the gods".[8] In all things, he followed the advice of his mother[9], who, according to Eusebius, was a very religious woman, and who, during her stay in Antioch, considered it very important to meet Origen, the greatest Christian theologian of the age.[10] Eusebius also mentions that the household of Alexander contained many Christian believers.[11]

12,12; Rom 16,5.23; 1Cor 16,19; Col 4,15; Phlm 2). *Cf.* Filson, F. V., *The Significance of the Early House Churches*, Journal of Biblical Literature, *vol.* 58, 1939, pp. 105–112; Thomas, J. Ph., *Private Religious Foundations in the Byzantine Empire*, Dumbarton Oaks Research Library and Collection, Washington, D.C., 1987, pp. 7–8.

3 Origen, *Contra Celsum* 1,1 (tr. F. Crombie). See *The Ante-Nicene Fathers. Translations of the Writings of the Fathers down to A.D. 325*, *vol.* 4, Charles Scribner's Sons, New York, 1913, p. 397.

4 Tertullian, *De ieiunio* 13,5. The great Carthaginian apologist concludes his description of gathering of Christians (*coitio Christianorum*) in his Apology with these words: "This gathering of Christians may properly be called illegal, if it is like illegal gatherings" (*Apologeticum* 39,20; tr. T. R. Glover). See *Tertullian. Minucius Felix*, Loeb Classical Library, William Heinemann, London, Harvard University Press, Cambridge, Massachusetts, 1984, p. 181.

5 Scriptores Historiae Augustae, *Severus Alexander* 18.

6 SHA *Sev. Alex.* 22.

7 SHA *Sev. Alex.* 45.51.

8 SHA *Sev. Alex.* 43 (tr. D. Magie). See *Scriptores Historiae Augustae*, *vol.* 2, Loeb Classical Library, William Heinemann, London, Harvard University Press, Cambridge, Massachusetts, 1980, p. 267.

9 SHA *Sev. Alex.* 14.60.66.

10 Eus. *Hist. eccl.* 6,21.

11 Eus. *Hist. eccl.* 6,28. According to the *Historia Augusta*, Alexander dismissed "from

The following passage of the *Historia Augusta* is the most interesting in terms of our topic: "And when the Christians took possession of a certain place, which had previously been public property, and the keepers of an eating-house maintained that it belonged to them, Alexander rendered the decision that it was better for some sort of a god to be worshipped there than for the place to be handed to the keepers of an eating-house."[12] This section raises a number of questions that would be difficult to answer clearly.[13] What is certain, however, is that during the reign of Severus Alexander several changes took place: (1) Christianity became a permitted religion, (2) Christians had the right of assembly, and (3) they were able to assert their claims before the imperial court. All this suggests that very significant steps were taken in this period in the field of state recognition of the legal capacity of Christian congregations.

Severus Alexander was succeeded on the throne by Maximinus (238–244), who began persecuting Christians again.[14] Another change in the situation of Christians took place during the reign of Philip I (244–249); the emperor of Arab descent, was himself a Christian, according to some sources.[15] This is questioned by many scholars[16], but it is certain that Christianity could have spread freely at that time.[17] Then other persecutions followed during the reigns of Decius (249–251), Gallus (251–253) and Valerian (253–260).[18]

When Gallienus (253–268), son of Valerian, became sole emperor in 260, he immediately restrained the persecution and permitted bishops to take possession again of the Christian cemeteries.[19] Christians were thus free to practice their religion again and to gather again in cemeteries for worship. Christians

service at the court all the depraved and those of ill-repute" (SHA *Sev. Alex.* 15; tr. D. Magie). See *op. cit.* (fn. 8), p. 207.

12 SHA *Sev. Alex.* 49 (tr. D. Magie). See *op. cit.* (fn. 8), p. 279.

13 *Cf.* Schnorr von Carolsfeld, L., *Geschichte der juristischen Person. Universitas, corpus, collegium im klassischen römischen Recht*, C. H. Beck, München, 1933 (Neudr. Scientia Verlag, Aalen, 1969), p. 250; Alföldi, A., *Der Rechtsstreit zwischen der römischen Kirche und dem Verein der Popinarii*, Klio, *vol.* 31, 1938, pp. 249–253; Bovini, G., *La proprietà ecclesiastica e la condizione giuridica della chiesa in età precostantiniana*, Giuffrè, Milano, 1948, pp. 56–58; Stertz, S. A., *Christianity in the Historia Augusta*, Latomus, *vol.* 36, 1977, pp. 705–706.

14 *Cf.* Eus. *Hist. eccl.* 6,28.

15 *Cf.* Eus. *Hist. eccl.* 6,34.

16 See, e.g., Pohlsander, H. A., *Philip the Arab and Christianity*, Historia, *vol.* 29, 1980, pp. 463–473.

17 *Cf.* Eus. *Hist. eccl.* 6,36.

18 *Cf.* Eus. *Hist. eccl.* 6,39; 7,1.10.

19 Eus. *Hist. eccl.* 7,13.

preferred to use cemeteries as meeting places[20], in many of which martyrs also rested.[21] According to some scholars, these burial grounds were owned by the bishops.[22] I do not share this opinion. The cemeteries were probably not owned by anyone; burial sites in Italy were considered *res religiosae* and classified as things under divine law (*res divini iuris*) that did not belong to anyone's property. Although provincial lands were the property of the Roman people or the emperor, burial grounds in the provinces were also considered religious.[23] Cemeteries could therefore not be owned by the bishops either in Italy or in the provinces.

During the years of freedom, the legal capacity of Christian congregations was again recognized. In terms of our topic, a very important lawsuit took place during the reign of Aurelian (270–275), who cultivated the cult of the Invincible Sun (*Sol Invictus*). From 260, Paul of Samosata filled the episcopal seat of Antioch. Paul pursued an immoral lifestyle and preached heretical doctrines. In 264 he was instructed by a local church council to return to Orthodox creeds; Paul promised to do so. However, because he had not kept his promise, in 268 another local synod was held on his case. This council condemned Paul, deposed him from his high priest's seat, excommunicated him, and elected a new bishop in the person of Domnus to head of the church of Antioch. However, Paul refused to leave "the house of the church" (*domus ecclesiae*). In 272, therefore, the believers (probably the Orthodox believers led by Domnus) turned to the emperor for a decision in their dispute over the house of the church. According

---

20 *Cf*. Tertullian, *Ad Scapulam* 3,1. Based on this fact, for a long time the *communis opinio* was that before 313 Christians gathered in funeral associations (*collegia funeraticia* or *collegia tenuiores*) recognized by the state. This position was first advocated by the famous archaeologist of the Roman catacombs, Giovanni Battista De Rossi (1822–1894). However, this view – unsupported by sufficient evidence and easily refuted by numerous counterarguments – was later clearly overturned. See the analysis of De Rossi's theory Bovini, *op. cit*. (fn. 13), pp. 114–125.

21 The body of St. Cyprian, bishop of Carthage, was also buried in a cemetery (*cf*. *Acta proconsularia Sancti Cypriani* 5,6).

22 See, e.g., Thomas, *op. cit*. (fn. 2), p. 9.

23 *Cf*. Gai. 2,3.6–7.9: "Subjects of divine right are things sacred and things religious. […] A religious thing becomes so by private will, when an individual buries a dead body in his own ground, provided the burial in his proper business. On provincial soil, according to most authorities, ground does not become religious as the dominion belongs to the people of Rome or the Emperor, and individuals only have possession or usufruct, but such places, though not properly religious, are to be regarded as quasi-religious. […] Things subject to divine dominion are exempt from private dominion…" (tr. E. Poste). See *Gai Institutiones or Institutes of Roman Law by Gaius*, The Clarendon Press, Oxford, 1904, pp. 122–123.

to Eusebius, the emperor Aurelian "gave an extremely just decision regarding the matter, ordering the assignment of the building to those with whom the bishops of the doctrine in Italy and Rome should communicate in writing."[24]

It is worth briefly analyzing the case. As Petersen writes, third-century *domus ecclesiae* consisted of "an unpretentious chapel, rooms for parochial activities, and simple accomodation for the clergy".[25] The *domus* was probably owned by the congregation. However, when Paul was deposed and Domnus was elected bishop, the local church split in two: some stood by Paul, others by Domnus.[26] Soon the debate began: who could use the house of the church?

It is important to note that the synod, which condemned Paul and elected Domnus as bishop, informed the bishop of Rome in a letter that he should continue to correspond with Domnus in ecclesiastical matters.[27] It is also noteworthy that Paul was in the service of Zenobia, the queen of Palmyra who rebelled against Rome and took control of the eastern provinces.[28] After this it is not surprising that Aurelian, who conquered Zenobia, after the recapture of Antioch in 272, decided against Paul and his followers in favour of Orthodox believers loyal to Rome.

The point for us is that the *domus* at issue was the property of the congregation. At the end of the third century, Christian congregations built larger and larger churches, in more and more places.[29] These church buildings, with few exceptions, were probably not owned by individual Christian believers but by

---

[24] Eus. *Hist. eccl.* 7,30 (tr. J. E. L. Oulton). See Eusebius, *The Ecclesiastical History*, *vol*. 2, The Loeb Classical Library, William Heinemann, London, Harvard University Press, Cambridge, Massachusetts, 1942, p. 225.

[25] Petersen, J. M., *House-Churches in Rome*, Vigiliae Christianae, *vol*. 23, no. 4, 1969, p. 272.

[26] We can be sure that, despite the synodical decisions, there were those who remained Paul's followers. Eusebius mentions Paul's partisans, a large number of bodyguards, and harlot priests and deacons whose sins Paul turned a blind eye to so that they would be his followers (*Hist. eccl.* 7,30).

[27] *Cf*. Eus. *Hist. eccl.* 7,30.

[28] According to Eusebius, Paul "sets his mind on high things and is lifted up, clothing himself with wordly honours and wishing to be called *ducenarius* rather than bishop" (*Hist. eccl.* 7,30; tr. J. E. L. Oulton). See *op. cit*. (fn. 24), p. 217. It is very likely that Zenobia endowed Paul, who was in her service, with worldly dignities; see Millar, F., *Paul of Samosata, Zenobia and Aurelian: The Church, Local Culture and Political Allegiance in Third-Century Syria*, The Journal of Roman Studies, *vol*. 61, 1971, pp. 1–17.

[29] According to Eusebius, before the start of Diocletian's persecution, Christians enjoyed complete freedom of religion and assembly. The number of congregations grew rapidly, and because of this, the old buildings did not prove to be sufficient, so wide and spacious churches were built in every city (*Hist. eccl.* 8,1).

the congregations corporatively.[30] Congregations thus became juridical persons (associations with legal capacity) before the outbreak of the Diocletian persecution.[31]

During the great persecution, Christian church buildings were demolished[32], the properties of both congregations and individual Christian believers were confiscated.[33] The above-mentioned edicts of toleration, issued in 313, providing for the return of confiscated properties, clearly recognized and strengthened the legal capacity of the local Christian congregations.

2.2. Charitable funds

Another problem with the property situation of the congregations before 313 is worth clarifying. From the beginning, Christians needed a common fund to support those in need. According to the Acts of the Apostles, among the members of the ancient church in Jerusalem "[t]hose who owned fields or houses would sell them, bring the money received from the sale, and hand it over to the apostles; and the money was distributed to each one according to his need."[34] From a legal point of view, this procedure can be interpreted as believers donating their money from the sale of their property to the apostles for further gift to those in need. The transaction between the believers and the apostles can thus be described as a *donatio sub modo*. All of this can also be understood as believers creating a non-independent foundation for charitable purposes.

St. Justin Martyr reports a similar procedure in his First Apology, written around 155: "they who are well to do, and willing, give what each thinks fit; and what is collected is deposited with the president, who succours the orphans

---

30 According to classical Roman law, temples belonged to the *res sacrae*, which were things that could not be owned by anyone. In the pagan age, only things that were consecrated with the consent of the Roman people or on the basis of a decision of the senate were considered *res sacrae* (*cf*. Gai. 2,5). It is unlikely that before 313 Christian church buildings would have been officially classified in this category. Naturally, this situation changed in the Christian era (*cf*. Inst. 2,1,8).

31 This fact is also proved by Egyptian papyri. One of them, dating from about 300, mentions donating land to a church as "an old custom" (P. Oxy. 12,1492). *Cf.* Thomas, *op. cit*. (fn. 2), p. 11.

32 *Cf*. Lact. *De mort. pers*. 12; Eus. *Hist. eccl.* 8,2,4.

33 *Cf*. Eus. *Hist. eccl.* 9,10,8.

34 Acts 4,34–35. The Biblical quotations are taken from: *Good News for Modern Man: The New Testament in Today's English Version*, American Bible Society, New York, 1966.

and widows and those who, through sickness or any other cause, are in want, and those who are in bonds and the strangers sojourning among us, and in a word takes care of all who are in need."[35]

Believers, therefore, essentially established a foundation by gift for charitable purposes.[36] This foundation did not have an independent legal personality, as the donations were merged into the bishop's private property. The bishop, as owner, was free to dispose of these goods: the use of them for charitable purposes was entrusted to his honesty. The foundation was therefore fiduciary in nature.

It is worth noting here that classical Roman law did not have the institution of an independent foundation with legal capacity.[37] Contemporary law recognized only the non-independent form of foundation, in which a person transferred a sum of money or a lucrative property to another person (either a natural person or an association), provided that the acquirer was required to make certain expenses for a specific purpose (usually from the annual interest on the money or the annual income from the property). For example, many Roman citizens took care of the survival of their own memory after their death by donating a relatively large sum of money or an agricultural property to their hometown with the stipulation that the city hold a festive feast in their honour each year on their birthday.[38] Or, as we know, Emperors Nerva (96–98) and Trajan (98–117) established an alimentary foundation by disbursing a loan from state property with the stipulation that the debtors pay the interest on the loan to feed the starving youth.[39]

---

35 Justin Martyr, *The First Apology* 67,6 (tr. M. Dods & G. Reith). See *The Ante-Nicene Fathers. Translations of the Writings of the Fathers down to A.D. 325*, *vol.* 1, Charles Scribner's Sons, New York, 1903, p. 186. Tertullian also mentions the financial fund created by the donations of the members of a Christian congregation and its use for charitable purposes in his Apology written at the end of the second century (*Apol.* 39,5–6).

36 During the reign of Antoninus Pius (138–161), Marcion gave 200,000 sesterces to the church of Rome (*cf*. Tertullian, *De praescriptione haereticorum* 30,1).

37 *Cf.* Kaser, M., *Das römisches Privatrecht. Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht*, C. H. Beck, München, 1955, p. 265.

38 This widespread practice is attested by a large number of inscribed monuments. *Cf.* Bruck, E. F., *The Growth of Foundations in Roman Law and Civilization*, Seminar, *vol*. 6, 1948, p. 1.

39 This is primarily evidenced by two monuments with inscriptions: the *Tabula Veleias* found in 1747 (CIL 11.1147 = ILS 6675) and the *Tabula Ligurum Baebianorum* found in 1832 (CIL 9.1455 = ILS 6509). *Cf*. Schnorr von Carolsfeld, *op. cit*. (fn. 13), p. 43.

The initial lack of legal capacity of local Christian congregations and the lack of a legal institution of an independent foundation caused problems and disputes in church practice for a long time, especially when the bishop died and his heirs claimed the property he had received from the believers for charitable purposes and which were merged into his private property.

These problems disappeared when the congregations became legal entities (i.e., when the congregations themselves could have property): when the property of the bishop and the congregation could be clearly separated. In order to settle or avoid property disputes, clear rules were established within the church, partly through customary law and partly through synod legislation. According to the collection of customary law entitled the Apostolic Canons, the property of the church was to be kept separate from that of the bishop, with an accurate record kept.[40]

3. FROM 313 TO THE AGE OF JUSTINIAN

3.1. Owners of ecclesiastical property

After 313, the Christian emperors issued a large number of edicts which, on the one hand, promoted the acquisition of property for the Church and, on the other hand, protected the ecclesiastical property in a special way. Here, above all, we need to clarify what organizations owned the church property.

Many of Justinian's edicts deal with properties that were given or left to Catholic churches, monasteries, or various charitable houses.[41] In the Institutes of the Emperor we can also read about legacies and *fideicommissa* which have been ordered "for the sacred and inviolable churches or other venerable places" (*sacrosanctis ecclesiis vel aliis venerabilibus locis*).[42] On the basis of these sources, it can be concluded that church buildings, monasteries and charitable houses had legal personality. But is this interpretation correct?

---

40 *Canones apostolorum* 40.

41 See, e.g., C. 1,2,23 pr.: "*si quis aliquam reliquerit hereditatem vel legatum vel fideicommissum vel donationis titulo aliquid dederit vel vendiderit sive sacrosanctis ecclesiis sive venerabilibus xenonibus vel ptochiis vel monasteriis masculorum vel virginum vel orphanotrophiis vel brephotrophiis vel gerontocomiis…*" In English translation: "if anyone leaves an inheritance or legacy or trust, or gives something as a donation, or sells something, whether to holy churches, venerable hospices, poorhouses, monasteries of men or virgins, orphanages, foundling-hospitals, elderly homes…" (tr. F. H. Blume & B. W. Frier). See Frier, B. W (ed.), *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text*, *vol.* 1, Cambridge University Press, Cambridge, 2016, p. 63.

42 Inst. 4,6,19; *cf.* 3,27,7.

This problem is very old. As early as the twelfth century, the question arose: if all the monks left a monastery and the building thus remained empty, would the property belonging to the monastery become *res nullius*? The archbishop of Ravenna, Moses, was of the opinion that the property would not become *res nullius* because the monastery itself (*i.e.* the building consisting of walls) owned the property. Johannes Bassianus, the famous glossator, on the other hand, keeping in mind the example of the *hereditas iacens*[43], believed that the property would become temporarily *res nullius* as the monks left, and if new monks later moved to the monastery, ownership of the property would pass to them with retroactive effect.[44] While the archbishop represented a position consistent with the customary law of his time, the glossator followed the Roman legal thinking.[45] According to Roman law, an association could have legal capacity, but a building could not.

Venerable places (in other words, buildings dedicated to religious or pious purposes) were in all cases closely connected with a particular association of persons. The Christian church building was so intertwined with the local congregation that both were denoted by the Greek word *ἐκκλησία* (in Latin, *ecclesia*).[46] The local congregations were obviously legal persons. This is evidenced by the edict of Constantine, which in 321 allowed anyone to leave his property to the local Catholic congregation.[47] This edict, using the word *concilium*, clearly endowed the local Catholic communities with a capacity to take under a will (passive *testamenti factio*) and not the local Catholic church buildings. The legal subjects were therefore not the church buildings but the congregations. The church buildings themselves as sacred things (*res sacrae*) did not, of course, belong to anyone's property. Therefore, the church buildings could not be alienated.

---

43 *Cf.* Gai. 2,9: "things belonging to an inheritance before any one has become heir have no actual owner" (tr. E. Poste). See *op. cit.* (fn. 23), p. 123.

44 This twelfth-century polemic is often referred to in literary works dealing with the historical roots of the foundation's institution. See, e.g., Feenstra, R., *The Development of the Concept Foundation in Continental Law*, Acta Juridica, *vol.* 14, 1971, p. 127.

45 *Cf.* Conte, E., *Roman Law vs Custom in a Changing Society: Italy in the Twelfth and Thirteenth Centuries*, in: Andersen, P.; Münster-Swendsen, M. (eds.), *Custom: The Development and Use of a Legal Concept in the Middle Ages. Proceedings of the Fifth Carlsberg Conference on Medieval Legal History 2008*, DJØF Publishing, Copenhagen, 2009, p. 48.

46 The Greek word σὐναγωγή also has such a double meaning, which denoted both the congregation and the meeting place (in the case of the Jews, the synagogue). The Latin word *templum* usually denoted a pagan temple, although in some Justinianic edicts this word exceptionally denotes a Christian church building; see, e.g., C. 1,3,27; 1,3,30(31),2.

47 CTh 16,2,4 = C. 1,2,1.

It is worth adding to this that the word *ecclesia*, in addition to a church building and a local church congregation, also meant the world Church. The idea and concept of the world Church was already formulated in the teaching of Jesus. When Jesus said to Peter, "you are a rock, and on this rock foundation I will build my Church"[48], he obviously thought of the world Church. In his epistles, St. Paul explains that Christians form one body, and that one body, like the mysterious body of Christ, is the world Church.[49] However, the world Church was a theological and not a legal concept. Unlike the local church congregations, the world Church had no legal personality.

Like the church buildings, the monasteries were closely intertwined with an association of persons: a community of monks living within their walls. The movable and immovable things belonging to a monastery were the property of the community of monks living there. It was not the monastery building that had legal personality, but the association of monks living within the walls of the building. The monasteries themselves, like the church buildings, were considered *res sacrae*. That is why monasteries could not be sold or converted into secular dwellings. In 451, the Ecumenical Council of Chalcedon ordered the following: "Monasteries, which have once been consecrated with the consent of the bishop, shall remain monasteries for ever, and the property belonging to them shall be preserved, and they shall never again become secular dwellings."[50] In 535, Justinian described the sale, exchange, or gifting of the venerable monasteries themselves and their conversion into secular dwellings as the most serious offence. The emperor declared these transactions void and ordered the restoration of the buildings to their former condition.[51]

The charitable houses were closely connected with two groups of people. One group consisted of the ultimate beneficiaries (the poor, the orphan, the foundling, the sick, the aged, the stranger). The other group was made up of the staff of the house, which served the beneficiaries. It is questionable which of these two groups was the owner of the movable and immovable property be-

---

48 Mt 16,18.

49 *Cf.* Rom 12,5; 1Cor 12,27; Col 1,18; 1,24; 3,15; Ef 4,12.16; 5,30. The idea that Christians form a single *corpus* in Christ occurs frequently in the writings of the Church Fathers (see, e.g., Orosius, *Liber apologeticus* 31,7: "*nos enim sub uno capite, quod est Christus, et sub una Ecclesia, quae est Christus, omnes fratres sumus et unum corpus in Christo*").

50 *Concilium Chalcedonense*, *can*. 24 (tr. H. R. Percival). See Schaff, P. (ed.), *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, *Second Series*, *vol.* 14, James Parker and Company, Oxford, The Christian Literature Company, New York, 1900, p. 284.

51 Nov. 7,11. *Cf*. Nov. 120,7,1.

longing to the house.[52] If we start from the fact that the donations and legacies were made for the benefit of the poor (or the orphan, *etc*.), we can consider the group of the beneficiaries as the owner.[53] If we look at the fact that the imperial edicts mention charitable institutions as pious and priestly associations[54], the staff appears to be the group with legal personality, since the staff consisted mostly of clerics and they performed pious activities.[55] However, the most correct solution seems to be to consider the two groups of people as a single association.[56] The local church congregations were also made up of clerics and laymen; the two groups jointly formed a single legal entity.

It is important to emphasize that Justinian's edicts call church congregations, monasteries and charitable institutions associations (Gr. συστήματα, Lat. *consortia*).[57] In my opinion, this use of the word clearly indicates that, like classical Roman law, Justinianic law recognized only one type of juridical person, the association with legal capacity. Independent foundations therefore did not appear in Justinianic law either.[58]

The buildings of charitable institutions, in my opinion, belonged to the *res sacrae*, just like the church buildings and monasteries. Thus, the development of law went in the following direction: after the victory of Christianity, first the

---

52 This question is analysed in detail by, among others, Duff, P. W., *Personality in Roman Private Law*, University Press, Cambridge, 1938, pp. 185–189.

53 This view was represented by Saleilles, R., *Les piae causae dans le droit de Justinien*, in: *Mélanges Gérardin*, Larose & Tenin, Paris, 1907, pp. 538–540.

54 *Cf*. C. 1,2,22 pr.; Nov. 7 pr.

55 According to Duff, "the Staff of a House are a much more convincing *consortium* or συστήμα than the beneficiaries." See Duff, *op. cit.* (fn. 52), p. 187.

56 Eventually Duff also comes to this conclusion. See Duff, *op. cit*. (fn. 52), p. 188.

57 One of the edicts in Latin contains the word *consortium* (C. 1,2,22 pr.). In the Greek-language edicts, we can find the plural form of the word συστήμα (C. 1,3,55(57),1; Nov. 7,1.2.9.12). Nevertheless, there is a point of view according to which *piae causae* were not legal entities. Bruck writes the following: "The *piae causae* were not yet recognized as juristic personalities, as owners of their property. The administrators (the προεστώς or the διοικητής) were considered as temporary and limited owners, as trustees" (see Bruck, *op. cit*. (fn. 38), p. 18). I do not share this opinion. I think the administrators were representatives of legal persons. As, among others, Blanch Nougués rightly points out, the *venerabiles domus* were true juridical persons (see Blanch Nougués, J. M., *Sobre la personalidad jurídica de las "fundaciones" en derecho romano*, Revista Jurídica Universidad Autónoma de Madrid, *vol*. 16, 2007, pp. 22–27).

58 The view that the charitable funds were owned by themselves is not consistent with Roman legal ideas, rather it is a reflection of modern percepcions. *Cf.* Buckland, W. W., *A Text-Book of Roman Law from Augustus to Justinian*, University Press, Cambridge, 1921, pp. 180–181.

Christian church buildings (*ecclesiae*), then the monasteries (*monasteria*), and finally the charitable houses – that is, the *ptochia* or *ptochotrophia* for the poor, the *orphanotrophia* for orphans, the *brephotrophia* for foundlings, the *nosocomia* for the sick, the *gerontocomia* for the old, and the *xenones* or *xenodochia* for poor or infirm pilgrims – were classified as *res sacrae*. Such an extension and generalization was particularly characteristic of the Justinianic legislation.[59]

3.2. Facilitating the church's acquisition of property

After that, let us look at the rules that facilitated the acquisition of wealth by the local churches and ecclesiastical institutions. The churches were able to increase their wealth primarily through pious donations. The following rules should be highlighted regarding donations. Under the classical Roman law, a formless promise of a gift could not be sued. This stemmed from an ancient Roman moral perception that leaned more towards frugality than generosity: gift-giving was seen as waste, which was morally condemned.[60] Christianity, on the other hand, has given a whole new, high moral value to generosity (*liberalitas*) arising from love. Jesus said to the rich young man: "If you want to be perfect, go and sell all you have and give the money to the poor, and you will have riches in heaven".[61] As a result of Christian morality, the Roman rules of gift-giving gradually changed. In the 470s, Emperor Zeno made the gift that had been informally promised for pious purposes subject to litigation.[62] This provision was confirmed by Justinian in 530.[63]

Believers with greater wealth were also able to support the activities of the church by building houses of worship, churches, monasteries and charitable houses. However, the maintenance of houses built for religious purposes from generous donations led to problems in the long run. According to Justinian's 67th novel, many people built a church in order for their name to survive fore-

---

59 *Cf*. Buckland, *op. cit*. (fn. 58), pp. 108, 152, 243, 256, 280, 296, 322, 325, 326, 346, 354, 362, 373, 517, 526, 688.

60 We can read the following statement in one of Plautus' comedies: "You do a beggar bad service by giving him food and drink; you lose what you give and prolong his life for more misery" (*Trinummus* 339–340; tr. P. Nixon). See *Plautus*, *vol.* 5, Loeb Classical Library, William Heinemann, London, Harvard University Press, Cambridge, Massachusetts, 1952, p. 131.

61 Mt 19,21.

62 C. 1,2,15. *Cf*. Grashof, O., *Gesetzgebung der römischen Kaiser über die Güter und Immunitäten der Kirche und des Klerus nebst deren Motiven und Principien*, Archiv für katholisches Kirchenrecht, *vol*. 36, 1876, p. 32.

63 C. 8,53,35.

ver, but then did not care about maintaining the building, failed to support the clergy who served there, and left their church in ruins. The emperor therefore ordered that if one wished to build a monastery, church or house of worship, he first must seek permission from the local bishop and provide adequate funds in advance for the maintenance of the building, lighting and other expenses, and the support of the clergy performing the service. Once enough money was made available for all of this, construction could begin. However, if the person wishing to build could not provide adequate funding for all this, he could, with the permission of the bishop and local clergy, rebuild a ruined church instead of building a new one, which then bore his name.[64]

These rules were supplemented by the 131st novel of Justinian, according to which anyone who started the construction of a new house of prayer or monastery or the renovation of an old one was obliged to carry out the work. If construction was abandoned, the local bishop, his stewards (Gr. οἰκόνομοι, Lat. *oeconomi*) and the governor could order the completion of the work. If the person died before the construction was completed, his heirs were obliged to carry out the necessary work.[65]

It also often happened that pious testators in their wills obliged their heirs to build a church, a house of prayer or some charitable house. According to an edict issued by Justinian in 530, in such cases the church was to be built within three years, the charitable house within one year of the acquisition of the inheritance. The local bishop could enforce such an obligation through litigation.[66]

The pious testamentary bequests of the believers played an important role in the rapid growth of the wealth of local churches.[67] As already mentioned, Constantine in 321 allowed anyone to leave his property for the benefit of a local Catholic congregation.[68] A number of people left property in their wills to the benefit of clergy, monks, the poor or prisoners of war. It should be noted here that according to the rules of classical Roman law, only those whose identity was specified by the testator in his will could inherit. Nor could a legacy or a *fideicommissum* be validly left for an "uncertain person" (*incerta persona*).[69] In

64 Nov. 67,1–2. *Cf.* Alivisatos, S. H., *Die kirchliche Gesetzgebung des Kaisers Justinian I.*, Trowitzsch & Sohn, Berlin, 1913 (Repr. Scientia Verlag, Aalen, 1973), pp. 86–87.

65 Nov. 131,7.

66 C. 1,3,45. In 545, the emperor increased the deadline for the construction of the church from three years to five years (Nov. 131,10).

67 *Cf.* Sáry, P., *Letztwillige Zuwendungen zu frommen Zweck im christlichen römischen Reich*, Journal on European History of Law, *vol*. 1, no. 2, 2010, pp. 27–33.

68 CTh 16,2,4 = C. 1,2,1. *Cf*. Grashof, *op. cit*. (fn. 62), pp. 12–13.

69 *Cf.* Gai. 2,238; Inst. 2,20,25. Legacy (*legatum*) was defined by Modestin as a donation left by a will (D. 31,36). Trust (*fideicommisum*) originally meant an

cases of pious testamentary bequests, the Christian emperors gradually lifted this strict requirement. The Emperor Marcian (450–457) made it clear in 455 that if something was left in a will for the poor, the provision was not invalid because it was for the benefit of unspecified persons.[70] This was confirmed by Justinian, who stated that a legacy could be validly left to the benefit of clergy, local churches, charitable houses, the poor and prisoners of war.[71]

If someone wanted to leave a legacy for the maintenance of the poor (*pro alimentis pauperum*), he could primarily make a will in favour of the local poorhouse. According to an edict of Justinian, the local poorhouse received the benefit even if the testator appointed the poor as heirs in his will, or if he left a legacy or a *fideicommissum* to the poor. If there were several poorhouses at the testator's place of residence, the poorest of them received the benefit. If there was no poorhouse in the given city, the bishop (or his representative, the *oeconomus* managing the church property) was obliged to distribute the allowance among the local poor, without taking into account the proportions determined by the *lex Falcidia*.[72]

It is clear from this text that the rules of the *lex Falcidia* did not have to be observed in cases of pious legacies: the *pia legata* could therefore exhaust more than three-quarters of the *hereditas*. This was later confirmed by Justinian's 131st novel, which stated that if the heir did not carry out the testator's order on the grounds that the amount that could be used for the pious purpose was not sufficient to achieve the given purpose, the whole *hereditas*, under the supervision of the local bishop, had to be used for the given purpose regardless of the *lex Falcidia*.[73]

One of the most praised forms of expression of Christian love was providing financial support for the redemption of prisoners of war (*pro redemptione captivorum*).[74] Emperor Leo the Great (457–474) issued a detailed edict in 468 regarding testamentary allowances left for this purpose. The Eastern Roman emperor strictly forbade anyone to hinder the execution of the will of the pious testator, arguing that the *legatum* or *fideicommissum* left for the redemption of captives was invalid due to its uncertain nature. (The disposition of the testa-

informally ordered, non-suitable legacy, in which case the execution of the testator's will was entrusted to the honesty of the person asked to do so (Inst. 2,23,1).

70 C. 1,3,24. *Cf*. Grashof, *op. cit*. (fn. 62), p. 31.

71 C. 6,48,1.

72 C. 1,3,48. The *lex Falcidia* (enacted in 40 B.C.) secured for heirs a fourth of the testator's property free of legacies (*cf*. Gai. 2,227).

73 Nov. 131,12 pr.

74 *Cf*. Levy, E., *Captivus redemptus*, Classical Philology, *vol*. 38, no. 3, 1943, p. 171.

tor could therefore not be contested on the basis that the beneficiaries of the allowance were *incertae personae*.) If the testator specified exactly who was to redeem the captives using the property benefit he left, then this person could demand the service of the object of the *legatum* or *fideicommissum*, and then, after obtaining it, was obliged to fulfil the testator's wishes. If the testator did not designate anyone to carry out this task, the bishop of the testator's birthplace could demand the delivery of the allowance from the heirs or the possessors of the object of the benefit. The bishop was obliged to announce to the governor of the province on which day and how much money he had received to redeem the prisoners of war, and from then on he had one year to carry out the testator's wishes.[75] The object of the *legatum* or *fideicommissum* therefore became the property of the local church, but a non-independent foundation was created for the purpose of redeeming the captives: the bishop was thus obliged to use the amount of the acquired benefit for this purpose.

In 531, Justinian confirmed that captives could be validly appointed as heirs, and even stated that a will with such content could not be attacked due to the institution of *incertae personae* even if the testator left his entire estate solely for the purpose of redeeming the captives in order to avoid the provisions of the *lex Falcidia*. The emperor obliged the bishop of the testator's place of residence and the *oeconomus* managing the property of the local church to redeem the captives, who could use the annual income of the immovable properties acquired through the will, as well as the purchase price received from the sale of the acquired movables and self-movables (slaves, animals) for the pious purpose.[76]

It often happened that the testators appointed Jesus Christ himself as their heir, or left a legacy or a *fideicommissum* to Christ. When regulating such cases, Justinian probably started from what Jesus would do if he were here on earth and he really took over the object of the inheritance, legacy or *fideicommissum*. Jesus would probably distribute it all to the poor. Based on this consideration, the emperor decreed that in such cases the local *ecclesia* can claim the benefit, which, however, must be used for the care of the poor.[77] The benefit therefore became the property of the congregation, but a fiduciary foundation was created for the purpose of providing for the local poor: thus, the local bishop was obliged to use the value of the property acquired for this purpose.

It also happened that an archangel or a martyr was appointed as heir, or a

---

75 C. 1,3,28.

76 C. 1,3,48(49). *Cf.* Grashof, *op. cit*. (fn. 62), pp. 43–45.

77 C. 1,2,25 pr.; Nov. 131,9 pr. *Cf.* Grashof, *op. cit*. (fn. 62) pp. 45–46; Alivisatos, *op. cit*. (fn. 64), p. 88; Knecht, A., *System des justinianischen Kirchenvermögensrechtes*, Verlag von Ferdinand Enke, Stuttgart, 1905, pp. 11–12, 103.

legacy or a *fideicommissum* was left to them. According to the provisions of Justinian, in such cases, the benefit could be obtained by the church or house of prayer that was consecrated in honour of the given archangel or martyr at the testator's place of residence. If there was no such church or house of prayer in (or around) the given settlement, then the church in the capital of the province consecrated in honour of the given archangel or martyr, received the benefit. If there was no such church in the metropolis, the benefit could be claimed by the congregation of the testator's place of residence. Otherwise, if there were several possible oratories in the given settlement, the allowance was given to the one to which the testator was more connected, and if this was not clear, the allowance could be claimed by the poorer house of worship.[78]

From the fifth century, local churches could also increase their wealth through intestate succession. Emperor Theodosius II decreed in 434 that if a bishop, priest, deacon, deaconess, subdeacon, other cleric, monk or nun dies without a will and leaves no surviving parents, children, other relatives, or wife, the inheritance goes to the local church or, in the case of a monk, to the monastery.[79]

The capacity to inherit intestate of the church was confirmed by Justinian in several edicts. According to the emperor's 115th novel, the local church could claim to the estate of a cleric who died without a will and had no Catholic relatives.[80] The 131st Justinianic novel stated that the inheritance of bishops, clerics and deaconesses belongs to the local church in the absence of a valid will and intestate successors.[81]

Churches and church institutions could acquire property *ex lege* in other ways besides inheritance. According to the provisions of Justinian, the property of those who wished to live as monks passed *ex lege* to the monastery upon entering the monastery. Of course, before entering the monastery, everyone could dispose of their property freely, but after entering the monastery, this was no longer possible. And if someone later left the monastery, he could not reclaim the property he brought into the monastery.[82]

In Justinianic law, the assets acquired by the bishops after their consecration became the property of the local church *ex lege*, with the exception of the assets

78 C. 1,2,25,1; Nov. 131,9,1.

79 CTh 5,3,1. According to the edict, an exception was made if the deceased person was a *colonus*, *libertinus* or *curialis*, because in these cases the *patronus* or the city council could become the heir.

80 Nov. 115,3.

81 Nov. 131,13.

82 Nov. 5,5; 76 pr.; 123,38. *Cf*. Alivisatos, *op. cit*. (fn. 64), p. 104; Frazee, Ch. A., *Late Roman and Byzantine Legislation on the Monastic Life from the Fourth to the Eighth Centuries*, Church History, *vol*. 51, no. 3, 1982, p. 273.

that the bishops received as gifts from their close relatives or inherited from them.[83] In the same way, the assets that the leaders of the charitable houses acquired after their appointment became the property of the respective houses *ex lege*, with the exception of the assets that the leaders acquired for free from their close relatives.[84]

The church was also able to obtain significant financial resources through confiscation.[85] As early as the first half of the fifth century, a number of edicts were passed according to which real estate used by heretics for religious purposes had to be transferred to the property of the local Catholic churches.[86] Justinian made similar provisions. In 536, the emperor ordered that the houses and fields where heretical doctrines were preached be confiscated in favour of the local Catholic church.[87]

Justinian ordered that those laymen who held church ceremonies without the participation of clerics be severely punished. The property of such persons (above all the real estate serving as the place of the ceremony) had to be given to the local church.[88]

Justinian took a firm stand against the buying and selling of ecclesiastical offices. If someone was ordained a bishop in return for a financial benefit, the object of the benefit had to be confiscated for the benefit of the local church. If a lay person received money or other things in order to support the consecration, that person was obliged to hand over twice the amount of money or the value of the thing to the local church.[89] The same procedure had to be followed in the event that someone was entrusted with the management of a church charitable institution in exchange for a financial benefit (in such cases, the object of the benefit was confiscated in favour of the concerned institution).[90] The entire property of a bishop who ordained a person as a bishop who according to the law should not have been ordained, or who performed the ordination without investigating the charges against the candidate, was also to be confiscated

83 C. 1,3,41.

84 C. 1,3,41; Nov. 131,13.

85 *Cf.* Sáry, P., *Confiscation for the Church in Justinianic Law*, in: Kotásek, J.; Bejček, J.; Kratochvíl, V.; Rozehnalová, N.; Mrkývka, P; Hurdík, J.; Polčák, R.; Šabata, J. (eds.), *Dny práva 2011 – Days of Law 2011*, Masarykova univerzita, Brno, 2012, pp. 178–184.

86 CTh 16,5,43.52.54.57.65.

87 Nov. 42,3. This provision was repeated by Justinian in 544 (Nov. 132).

88 Nov. 131,8.

89 Nov. 6,1; 123,2.

90 Nov. 123,16.

in favour of the local church.[91]

Justinian prohibited churchmen from certain transactions (*e.g.* guaranteeing) and activities (*e.g.* tax collection). In case of violation of this prohibition, the bishops were to be sentenced to complete confiscation of their property, and the clerics sentenced to a fine to be determined by the bishop judging the case, for the benefit of the local church.[92]

Many times Justinian ordered total or partial confiscation of property for the benefit of local churches or monasteries as a secondary punishment for crimes against sexual morality. The property of adulterers, persons who divorced their spouses without a legal reason, men who kidnapped nuns or deaconesses for the purpose of marriage, and deaconesses who broke their vow of chastity had to be confiscated – in whole or in part – for the benefit of the local church or the monastery where the offender was imprisoned as a punishment.[93]

Finally, in some cases, the church's wealth could also be increased by the payment of fixed fines. A magistrate who ordered a bishop to appear and be present in any civil or criminal case without the emperor's order and against the will of that bishop was to be deprived of his office and sentenced to a fine of 20 pounds of gold in favour of the local church.[94]

3.3. Special protection of church property

In order to prevent churches and church institutions from losing their property, the Christian emperors limited the right to dispose of church property with prohibitions on alienation. In 470, Emperor Leo the Great forbade the immovable properties of the church of Constantinople to be alienated. The emperor justified this provision as follows: "*sicut ipsa religionis et fidei mater perpetua est, ita eius patrimonium iugiter servetur illaesum*", that is, just as the Church itself (the mother of religion and faith) is eternal, so its property must also be preserved permanently without harm.[95]

Emperor Anastasius (491–518) extended the scope of the prohibition of alienation to the entire territory of the Patriarchate of Constantinople, but at the same time relaxed the prohibition: in certain cases – exceptionally – aliena-

91 Nov. 123,1–2.

92 Nov. 123,6.

93 Nov. 6,6; 117,13; 123,30.43; 127,4; 134,10–12. *Cf.* Noethlichs, K. L., *Das Kloster als 'Strafanstalt' im kirchlichen und weltlichen Recht der Spätantike*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung, *vol.* 80, 1994, pp. 34–36.

94 Nov. 123,8.

95 C. 1,2,14,2. *Cf.* Nov. 7 pr.

tion was allowed. Thus, for example, he permitted the sale of real estate, subject to strict formal requirements, if the purchase price was needed to pay debts or carry out urgent repair work, or if the purchase price could be used to buy another property that could be better used. He also allowed advantageous exchange and allowed the churches to freely dispose of their unusable properties.[96]

In 535, Justinian extended the prohibition of alienation to the entire empire but repealed the provisions of Anastasius that allowed alienation in exceptional cases. He strictly forbade the real estate of churches and church institutions to be sold to anyone, given away or exchanged with anyone other than the state.[97] By leaving the possibility of exchanging real estates with the state, exceptionally, in the public interest, Justinian essentially wanted to ensure that, if necessary, church real estate could also be expropriated. According to the edict, in such cases, an exchange property equal to or more valuable than the property taken had to be given to the local church or church institution.[98]

In the event of a sale in violation of the prohibition, the buyer was obliged to return the property, but did not receive the purchase price back. In the case of a gift, in addition to returning the property, the recipient was obliged to pay the church an amount equal to the value of the property. If the exchange took place in an illegal manner, the property received from the church had to be returned in such a way that the church could keep the exchange property. In all these cases, the aggrieved party could file a claim for damages against the person who entered into the contract on behalf of the given church, church charitable institution or monastery: the latter person was responsible for the damage caused with his own property; the church or church institution itself could not be sued.[99]

Shortly afterwards, Justinian was forced to relax the strict prohibition on the alienation of church properties as a result of practical problems. Already in 536 or 537, he allowed individual rural churches and ecclesiastical institutions to alienate their immovable properties if they could not pay their taxes in any other way.[100] In 537, he also allowed local churches, monasteries and charitable institutions outside the capital to transfer their immovable properties to each

96 C. 1,2,17. *Cf*. Nov. 7 pr.

97 Nov. 7,1. *Cf*. Grashof, O., *Die Gesetze der römischen Kaiser über die Verwaltung und Veräusserung des kirchlichen Vermögens*, Archiv für katholisches Kirchenrecht, *vol*. 36, 1876, p. 211.

98 Nov. 7,2.

99 Nov. 7,5. Alienation transactions that conflicted with the prohibition were therefore considered partially invalid: based on the transaction, the local church (or ecclesiastical institution) could acquire rights, but not obligations.

100 Nov. 46,1.

other, i.e. to exchange properties with each other, with the approval of the metropolitan.[101] In 544, he allowed church immovable properties to be alienated for the redemption of prisoners of war.[102]

It is worth mentioning here that according to the edicts of Justinian, the sacred vessels and clothes needed for church ceremonies could be alienated only for the purpose of redemption of captives. In the event of violation of these provisions, rules similar to those applicable to real estate were applied.[103]

Justinian also limited the possibility of encumbering church properties. In 535, the emperor prohibited pledging of church properties.[104] If, despite this, the property of a church was pledged, the creditor lost his claim and was obliged to return the pledged object.[105] In 544, Justinian changed these rules: he made it possible to pledge church properties in cases where a church or church institution had to take out a loan to pay its debts. In such cases, the mortgage lenders who disbursed the loan could claim a maximum interest rate of 3% per year, which meant a significant discount for the church.[106] The novel also stated that the property of the church of Constantinople could only be pledged for a period longer than five years with the approval of the patriarch; when concluding such deals, persons acting on behalf of the church had to swear that they would not cause harm to the church.[107]

Emperor Leo allowed usufructuary rights to be established on church properties, but he made this conditional on the usufructuary transferring ownership of another property of similar value to the church in exchange for the use of and taking the fruits of the church property.[108] Justinian repeatedly confirmed these rules, which were extremely beneficial for the church.[109]

Justinian also restricted the leasing and emphyteutic leasing of church properties. He strictly forbade establishing *ius colonarium* on church properties (which formed an interesting transition between lease and sale).[110] In 530, the emperor set the maximum duration of ordinary leases of church properties at

---

101 Nov. 54,2.
102 Nov. 120,9.
103 C. 1,2,21; Inst. 2,1,8; Nov. 7,8.
104 Nov. 7,1.
105 Nov. 7,6.
106 Nov. 120,4.6. Justinian, as a general rule, maximized the rate of transaction interest at 6% per year (C. 4,32,26).
107 Nov. 120,5.
108 C. 1,2,14. *Cf.* Nov. 7 pr.
109 Nov. 7,4; 120,2.9.
110 C. 1,2, 24; Nov. 7 pr.

twenty years[111], and in 544 at thirty years.[112] The church could terminate the rental agreement immediately – that is, before the end of the rental period – if the tenant caused damage to the rental property; in such cases, the tenant was obliged to compensate the damage.[113]

In several of Justinian's edicts, church property could be leased on *emphyteusis* for a maximum of three lifetimes, *i.e.* the right of emphyteutic lease could be transferred to the lessee's child and grandchild (or his spouse, if the parties so agreed), but it could not be inherited further.[114] The emperor modified this rule later. In 537, he made it possible for churches and church institutions outside the capital to enter into emphyteutic lease contracts with each other without time limits.[115]

In Constantinople, the amount of the emphyteutic lease fee had to be determined by a committee consisting of two specialists, the church's stewards, five priests, two deacons and the archbishop.[116] The fixed fee could later be reduced by a maximum of one-sixth.[117] If the *emphyteuta* did not pay the fee for two years, the church (or ecclesiastical institution) could unilaterally terminate the contract.[118] If the *emphyteuta* caused damage to the property, he was obliged to restore it to its original condition (before the damage occurred) at his own expense, and he had to return the property together with all interim income.[119] In order to make this enforceable, Justinian ordered that church properties be leased on *emphyteusis* exclusively to rich persons.[120] If the provisions of the law were violated when the emphyteutic lease agreement was concluded, the contract was considered invalid: the real estate had to be returned, the *emphyteuta* lost the fee already paid, and moreover, as a punishment, he had to continue paying the fee to the church (or church institution) as if the contract would

111 C. 1,2,24.

112 Nov. 120,3.

113 C. 1,2,24.

114 C. 1,2,24; Nov. 7 pr.; 7,3; 120,1. According to the general rules, the right of *emphyteusis* was not really limited in time (Inst. 3,24,3). *Cf.* Grashof, *op. cit.* (fn. 97), pp. 209–211; Pfannmüller, G., *Die kirchliche Gesetzgebung Justinians hauptsächlich auf Grund der Novellen*, Schwetschke & Sohn, Berlin, 1902, p. 15.

115 Nov. 55,2. This was confirmed by the emperor in 544 (Nov. 120,6).

116 Nov. 7,3.

117 C. 1,2,24; Nov. 7,3; 120,1.

118 Nov. 7,3; 120,8. This meant a privilege for the church, because according to the general rules of *emphyteusis*, the owner could only terminate the contract unilaterally if the *emphyteuta* did not pay the rent for three consecutive years (see C. 1,4,32; 4,66,2.4). *Cf.* Pfannmüller, *op. cit.* (fn. 114), p. 16.

119 Nov. 7,3.

120 C. 1,2,24,5.

have been legally concluded.[121]

Justinian also created many other rules to protect the property of the church. He prohibited, for example, local churches (and ecclesiastical institutions) from buying unusable real estate and unproductive land. In such cases, the contract was considered invalid, the services provided were void, and the person who concluded the transaction on behalf of the church (or church institution) was responsible for any damages that may arise on the part of the church with his own property.[122] The emperor also strictly forbade the persons managing the assets of churches (or ecclesiastical institutions) to conclude any contracts with their own relatives regarding the real estate of the church (or ecclesiastical institution).[123]

Among the Justinianic edicts protecting the church property, it is important to highlight those that defined the time of prescription for the church's claims differently from the general rules.[124] In 530, the emperor set the limitation period for claims that could be initiated by local churches, monasteries and church charitable institutions at one hundred years, which was considered the longest period of human life. This long deadline applied to the prescription of both *in rem* and *in personam* actions.[125] In 541, the emperor reduced the prescription period for ecclesiastical claims from one hundred years to forty years: he explained his decision by saying that the excessively long period often led to injustices.[126] He confirmed this provision in 545, re-stating that the claims of churches (and ecclesiastical institutions) expire only in forty years instead of ten, twenty or thirty years.[127]

According to one of the basic principles of Roman law, no one could get rich at the expense of another without a legal basis.[128] However, this rule of natural law did not apply to the local churches and ecclesiastical institutions: in the Justinianic era, the church institutions could get rich even without a legal ba-

---

121 Nov. 7,7; 120,11. The contract was therefore considered invalid only from one side: the church acquired a right through the transaction, but not an obligation.

122 Nov. 7,12; 120,9. *Cf.* Knecht, *op. cit.* (fn. 77), p. 127.

123 Nov. 120,5.7.

124 *Cf.* Grashof, *op. cit.* (fn. 62), p. 40; Knecht, *op. cit.* (fn. 77), pp. 133–135; Ferrari Dalle Spade, G., *Immunità ecclesiastiche nel diritto romano imperiale*, Atti del Reale Istituto Veneto di Scienze, Lettere ed Arti, *vol.* 99, 1939–1940, pp. 242–243.

125 C. 1,2,23. According to the dubious account of Procopius, Justinian issued this law in collusion with a document forger and the fraudulent stewards of the Church of Emesa, under the influence of bribes (*Historia arcana* 28).

126 Nov. 111,1.

127 Nov. 131,6.

128 *Cf.* D. 50,17,206.

sis. This is indicated by the provisions mentioned above in the context of the contracts concluded with a church, which conflict with the legal prohibition of alienation: as we have seen, based on these limping transactions (*negotia claudicantia*), the church acquired rights, but not obligations, and the financial advantage could not be reclaimed from the church on the grounds of unjust enrichment (at most compensation could be demanded from the *oeconomus* acting on behalf of the local church). The fact that a church can get rich even without a legal basis is clearly stated in the Institutes of Justinian, where we can read that if something has been paid out to a church or an ecclesiastical institution as a legacy or *fideicommissum* by mistake, it cannot be reclaimed through litigation.[129]

Justinian also issued a number of edicts that indirectly protected the property of the local churches. The biggest financial burden for the local churches was the maintenance of the clergy. The number of clerics in this era was very high. Justinian therefore limited the number of clerics in several edicts in 535, prohibiting ordinations above the specified number.[130] With this limitation, the emperor wanted to prevent the impoverishment and indebtedness of the churches.

Justinian's edict strictly limiting the bishops' travels served the same purpose. In this era, every major settlement had its own bishop, who travelled very often, mainly to the imperial court, in order to arrange certain matters. The bishops carried out constant lobbying activities, often travelling in the interest of their city in order to obtain some privilege.[131] Since the journeys of the bishops were financed by the local churches, these journeys meant a great burden for the churches. Justinian therefore forbade the bishops to travel to the capital without an express imperial order.[132]

4. CONCLUSION

Our most important findings can be summarized as follows. In the first and second centuries, Christians held their worship services exclusively in private houses. They created sheltered foundations for charitable purposes from their donations; these funds were the property of the bishops for a long time. During the third century – under the reign of emperors who did not disturb Christians – the local Christian communities became legal entities and thus could acquire property. From then on, the charitable donations did not belong to the bishops,

129 Inst. 3,27,7.

130 Nov. 3; 6,8; 16. *Cf.* Grashof, *op. cit.* (fn. 62), p. 49.

131 *Cf.* Rapp, C., *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition*, University of California Press, London, 2005, pp. 260–273.

132 C. 1,3,42; Nov. 6,2–3; 67,3; 86,8; 123,9.

but to the congregations. Larger and larger Christian churches were built, which were also owned by local congregations. Emperors persecuting Christians (such as Diocletian) confiscated the property of both Christian believers and churches. According to the edicts of toleration issued in 313, confiscated goods had to be returned to their former owners. These edicts clearly recognized the legal capacity of Christian congregations.

The Christian Roman emperors supported the local churches' acquisition of property and church property was given special protection. The informal promise of a gift for a pious purpose was declared actionable. In addition to the church congregations, the monastic communities living in individual monasteries and the associations consisting of persons belonging to individual charitable houses became legal entities. Assets could be bequeathed to local churches, monasteries, charitable houses, for the care of the poor, and for redeeming prisoners of war.

Church wealth could grow not only through transactions. Congregations could also acquire property through intestate succession. The property of the persons who entered the monastery passed *ex lege* to the monastery. Assets acquired by the bishops and the managers of the charitable houses became *ex lege* the property of the churches and the respective houses. The property of the perpetrators of certain crimes was confiscated for the benefit of churches, monasteries and charitable houses.

In order to protect the material base of the church, the Christian emperors strictly limited the alienation and encumbrance of church properties. Justinian also forbade churches and ecclesiastical institutions from buying unusable real estate (barren land). In Justinianic law, property claims of the local churches (and ecclesiastical institutions) expired only after a very long period of time (much longer than the general periods of prescription). Some of Justinianic edicts indirectly protected the property of churches. Such were, for example, the provisions that limited the number of clerics and the travels of bishops.

BIBLIOGRAPHY

Alföldi, A., *Der Rechtsstreit zwischen der römischen Kirche und dem Verein der Popinarii*, Klio, *vol*. 31, 1938, pp. 249–253.

Alivisatos, S. H., *Die kirchliche Gesetzgebung des Kaisers Justinian I*., Trowitzsch & Sohn, Berlin, 1913 (Repr. Scientia Verlag, Aalen, 1973).

Blanch Nougués, J. M., *Sobre la personalidad jurídica de las "fundaciones" en derecho romano*, Revista Jurídica Universidad Autónoma de Madrid, *vol*. 16, 2007, pp. 9–28.

Bovini, G., *La proprietà ecclesiastica e la condizione giuridica della chiesa in età precostantiniana*, Giuffrè, Milano, 1948.

Bruck, E. F., *The Growth of Foundations in Roman Law and Civilization*, Seminar, *vol*. 6, 1948, pp. 1–19.

Buckland, W. W., *A Text-Book of Roman Law from Augustus to Justinian*, University Press, Cambridge, 1921.

Conte, E., *Roman Law vs Custom in a Changing Society: Italy in the Twelfth and Thirteenth Centuries*, in: Andersen, P.; Münster-Swendsen, M. (eds.), *Custom: The Development and Use of a Legal Concept in the Middle Ages. Proceedings of the Fifth Carlsberg Conference on Medieval Legal History 2008*, DJØF Publishing, Copenhagen, 2009, pp. 33–49.

Duff, P. W., *Personality in Roman Private Law*, University Press, Cambridge, 1938.

Feenstra, R., *The Development of the Concept Foundation in Continental Law*, Acta Juridica, *vol*. 14, 1971, pp. 123–130.

Ferrari Dalle Spade, G., *Immunità ecclesiastiche nel diritto romano imperiale*, Atti del Reale Istituto Veneto di Scienze, Lettere ed Arti, *vol*. 99, 1939–1940, pp. 107–248.

Filson, F. V., *The Significance of the Early House Churches*, Journal of Biblical Literature, *vol*. 58, 1939, pp. 105–112.

Frazee, Ch. A., *Late Roman and Byzantine Legislation on the Monastic Life from the Fourth to the Eighth Centuries*, Church History, *vol*. 51, no. 3, 1982, pp. 263–279.

Grashof, O., *Gesetzgebung der römischen Kaiser über die Güter und Immunitäten der Kirche und des Klerus nebst deren Motiven und Principien*, Archiv für katholisches Kirchenrecht, *vol*. 36, 1876, pp. 3–51.

Grashof, O., *Die Gesetze der römischen Kaiser über die Verwaltung und Veräusserung des kirchlichen Vermögens*, Archiv für katholisches Kirchenrecht, *vol*. 36, 1876, pp. 193–214.

Kaser, M., *Das römisches Privatrecht. Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht*, C. H. Beck, München, 1955.

Knecht, A., *System des justinianischen Kirchenvermögensrechtes*, Verlag von Ferdinand Enke, Stuttgart, 1905.

Levy, E., *Captivus redemptus*, Classical Philology, *vol*. 38, no. 3, 1943, pp. 159–176.

Millar, F., *Paul of Samosata, Zenobia and Aurelian: The Church, Local Culture and Political Allegiance in Third-Century Syria*, The Journal of Roman Studies, *vol*. 61, 1971, pp. 1–17.

Mitchell, S., *Maximinus and the Christians in A.D. 312: A New Latin Inscription*, The Journal of Roman Studies, *vol*. 78, 1988, pp. 111–116.

Noethlichs, K. L., *Das Kloster als 'Strafanstalt' im kirchlichen und weltlichen Recht der Spätantike*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung, *vol*. 80, 1994, pp. 18–40.

Petersen, J. M., *House-Churches in Rome*, Vigiliae Christianae, *vol*. 23, no. 4, 1969, pp. 264–272.

Pfannmüller, G., *Die kirchliche Gesetzgebung Justinians hauptsächlich auf Grund der Novellen*, Schwetschke & Sohn, Berlin, 1902.

Pohlsander, H. A., *Philip the Arab and Christianity*, Historia, *vol*. 29, 1980, pp. 463–473.

Rapp, C., *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition*, University of California Press, London, 2005.

Saleilles, R., *Les piae causae dans le droit de Justinien*, in: *Mélanges Gérardin*, Larose & Tenin, Paris, 1907, pp. 513–551.

Sáry, P., *Letztwillige Zuwendungen zu frommen Zweck im christlichen römischen Reich*, Journal on European History of Law, *vol*. 1, no. 2, 2010, pp. 27–33.

Sáry, P., *Confiscation for the Church in Justinianic Law*, in: Kotásek, J.; Bejček, J.; Kratochvíl, V.; Rozehnalová, N.; Mrkývka, P; Hurdík, J.; Polčák, R.; Šabata, J. (eds.), *Dny práva 2011 – Days of Law 2011*, Masarykova univerzita, Brno, 2012, pp. 178–184.

Schaff, P. (ed.), *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, *Second Series*, *vol*. 14, James Parker and Company, Oxford, The Christian Literature Company, New York, 1900.

Schnorr von Carolsfeld, L., *Geschichte der juristischen Person. Universitas, corpus, collegium im klassischen römischen Recht*, C. H. Beck, München, 1933 (Neudr. Scientia Verlag, Aalen, 1969).

Stertz, S. A., *Christianity in the Historia Augusta*, Latomus, *vol*. 36, 1977, pp. 694–715.

Thomas, J. Ph., *Private Religious Foundations in the Byzantine Empire*, Dumbarton Oaks Reserch Library and Collection, Washington, D.C., 1987.

Sažetak

Pál Sáry*

IMOVINSKOPRAVNI POLOŽAJ CRKVE U RIMSKOM CARSTVU

U radu se obrađuju pitanja pravne sposobnosti i imovinskih prava rastućih crkvenih zajednica i institucija u Rimskom Carstvu od njihovih početaka do Justinijanova doba. U početcima, darovanja učinjena u dobrotvorne svrhe postajala su vlasništvo biskupa, no tijekom vremena, kada kršćanske zajednice vjernika stječu određene karakteristike pravnih osoba, dolazi do razdvajanja imovine biskupa od imovine zajednice. Pritom se ističe da su mjesne crkve mogle imati vlasništvo nad nekretninama već i prije 313. godine, kada je potvrđena pravna sposobnost zajednica vjernika. Kasnije, po uzoru na mjesne crkve, samostani i dobrotvorne ili nabožne ustanove su također postali subjekti prava. Dobrotvorne ustanove su pritom bile udruženja osoba, a ne zaklade, jer potonje nisu bile priznate ni u klasičnom ni u Justinijanovu pravu. Općenito, u radu se ističe važnost edikata kršćanskih careva kojima je u velikoj mjeri omogućeno stjecanje imovine od strane mjesnih crkava, samostana i dobrotvornih ustanova. Uz to, niz pravnih pravila donesen je upravo radi zaštite crkvene imovine.

Ključne riječi: rimsko pravo, crkvene pravne osobe, darovanja u dobrotvorne svrhe, oporuke u nabožne svrhe, zabrana otuđenja

* Dr. sc. Pál Sáry, profesor Pravnog fakulteta Sveučilišta u Miskolcu, 3515 Miskolc, Mađarska; pal.sary@uni-miskolc.hu;
ORCID ID: orcid.org/0000-0003-0524-8585