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Death, Blood, and Succession: Justinian's Novel 158 and the relationship between inheritance law and imperial power in late Roman law

By Flora MacKechnie

Introduction

This paper looks to Justinian's *Novel 158* to determine the relationship between imperial power, blood, and inheritance in late Roman law. Within this paper, blood' and 'blood relationship' refer to those in kinship, for example, mothers, fathers, children, and siblings. I will use this definition to explain how blood connections were endowed with proprietorial value through the Imperial State's developments in inheritance law. Power refers to the Imperial State and its ability to influence family hierarchy and Empire. Thus, the concept of blood can be used in the abstract because the legal value and the cultural value of a blood relationship could be altered according to the Imperial State's policy aims. The approach of this paper is guided by David Miller and Peter Sarris' annotated translations of Justinian's *Novels*. Miller and Sarris treat the *Novels* as self-conscious literary constructions which emphasise how juristic science functioned as part of imperial power. After discussing the facts of *Novel 158*, this paper will look to how Justinian's *Novel 158* comprises of three dimensions demonstrating the connection between blood and imperial power. The first dimension is cultural and highlights how inheritance and power were linked in late Roman society. The second dimension concerns the impact of the line of succession on the Roman familial hierarchy. The third dimension exhibits the dynamic between inheritance law and imperial power.

Historians of the 6th Century Eastern Roman or Byzantine Empire (for the purposes of this paper, the Roman or Imperial Empire henceforth) such as William Gordon have argued that Justinian's revision to the agnatic line of succession in *Novel 118* signifies an increasing recognition of the blood principle.[431] This paper takes a corrective approach and argues that the exchange of agnatic for general blood principle was not a policy change insofar that the Imperial State had always dealt with a kind of blood. Thus, the change in succession law from agnatic line to general blood line should be viewed as a development within the principle of blood. If the Imperial State dealt consistently with a blood principle in inheritance law, Justinian's *Novel 158* exemplifies how the Imperial State manipulated legal definitions of 'blood' to consolidate its control over family structures.

Novel 158

The *Novels* of Justinian begin after the mid 6th century-promulgation of the *Codex* which sought to "compile and harmonize" the imperial law.[432] Once it became clear that the law would require updating, Justinian circulated the *Novels* in a petition and response structure, rather than an official compilation.[433] The *Novels* were a compressed and reworded version of the Quaestor Tribonian's *Corpus Juris Civilis* and frequently

[431] William Gordon, 'Succession', in Ernest Metzger (ed.), *A Companion to Justinian's Institutes* (London, 1998), 110.
[432] Timothy Kearley, 'The Creation and Transmission of Justinian's Novels', *Law Library Journal*, 102: 3 (August 2010), 278.
[433] *Ibid.*, 379.

asserted that the *Codex* could contain no contradiction.[434] This was stated explicitly in *Constitutio Omnem*, which specifically addressed professors of law.

Novel 158 has been dated at AD 544 and concerns a contest of entitlement between a paternal aunt, Thecla Manos, and maternal uncle, Cosmas, for the inheritance of an orphaned child Sergia. Sergia died within weeks of her mother Thecla's decease.[435] Upon applying to the local advocate, John, for his opinion on her claim, Thecla Manos was favoured. However, when John presided in the hearing between Thecla Manos and Cosmas, he changed his verdict to favour Cosmas:[436]

> John had given a decision contrary to the written answer to her[…]but he had also induced her, our suppliant, to enter into a pact in conformity with the decision, suggesting that also to Asclepius, who acted on behalf of Cosmas.[437]

It is implied here that the case came to an arbitration hearing with a formal pact, possibly *compromissum*, as Cosmas' advocate later argues that his claim should be upheld by the Emperor regardless of the legal situation concerning the case itself.[438] The *Novel* is structured as a response to Thecla Manos' direct petition to Emperor Justinian for her claim to Sergia's inheritance.

Cosmas' claim rests on *Codex* 6.30.18, a Theodosian constitution which states that a child under seven years old remains in infancy and requires the appointment of a guardian or tutor to be entitled to maternal inheritance:

> in support of his decision, the law of Theodosius, of sacred memory [*Codex* 6.30.18], holding that the person not yet seven years of age could not acquire her maternal inheritance, unless he or she had a guardian, but that it belonged to those to whom it would fall as if the minor under the age of puberty, who died, had not been called to this inheritance.[439]

Due to the short period between Sergia and Thecla's death, no guardian was appointed. In the case of there being no guardian, the law behaves as if the child had never existed, and the inheritance reverts to whomever would have received the inheritance from Thecla, which would have been her brother, Cosmas. Nevertheless, the aunt, Thecla Manos' claim is supported by *Codex* 6. 30. 18.4 and *Codex* 6.30.19:

> the petitioner asks us that we do not permit any wrong to be inflicted upon her, especially since in the Code bearing our name there is a law [*Codex* 6.30.18.4] which provides that an infant which is able to speak can rightly acquire her mother's inheritance, and since we enacted a further law [*Codex* 6.30.19], providing that, if anyone is called to an inheritance and dies before claiming or renouncing it, he transmits his right of deliberation in connection with such inheritance to his heirs.[440]

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434 Paul du Plessis, 'Property', in David Johnston (ed.), *The Cambridge Companion to Roman Law* (Cambridge, 2015), 192.
435 David Miller and Peter Sarris, *The Novels of Justinian: A Complete Annotated English Translation* (Cambridge, 2018), 987. Both Sergia's deceased mother and her paternal aunt (the appellate) are named Thecla. In the interests of clarity, Sergia'a aunt will be referred to exclusively as Thecla Manos and her mother as Thecla.
436 *Ibid.*, 988.
437 *Ibid.*
438 *Ibid.*
439 *Ibid.*
440 *Ibid.*

Thus, Thecla Manos relies on *Codex* 6. 30. 18.4 and can therefore invoke *Codex* 6.30.19. This provides that an heir has a *spatium deliberandi* (the period of one year for an appointed heir to accept an inheritance). If this period is not exhausted by the time the appointed heir dies, the time of deliberation is inherited by the heirs of the deceased. Thus, Thecla Manos argues that Sergia was entitled to her maternal inheritance and that she, as Sergia's aunt, has therefore inherited the period in which to accept the inheritance.[441] It should be noted here that this case precisely presents a situation where it appears the Justinianic *Codex* contained contradiction. The drafter of *Novel 158* does not specifically deal with the discrepancy between the entitlement to inheritance for the child under seven in *Codex* 6. 30.18 and the child able to speak in *Codex* 6.30.18.4. It is suggested that the respective laws apply in different circumstances, but the lack of specificity in the *Codex* is neglected:

> Our law [*Codex* 6. 30. 18.4] shall prevail in the present case and those that are similar to it; the law of Theodosius of sacred memory [*Codex* 6.30.18] shall prevail in those cases in which a year and the time for deliberation has gone by.[442]

The deciding factor of the case lies with the period to accept inheritance, and the case is thus decided in favour of Thecla Manos by providing that *Codex* 6.30.18 is applicable only where the child died "more than a year after becoming able to inherit from the initial deceased without acceptance of inheritance".[443] *Novel 118* is briefly mentioned, stating that the agnatic line and cognatic line of the paternal aunt and maternal uncle would render the pair equal beneficiaries of the inheritance.[444] However, because Thecla Manos and Cosmas' proceedings took place prior to *Novel 118*'s enactment, Justinian favours the claim of the paternal aunt in line with the preference for agnatic lines in the classical Roman law.

The formal pact made in the earlier arbitration, to which Thecla Manos is appealing to Justinian to vitiate, is only briefly and cryptically addressed. It is implied by the *Novel* that private, formal agreements are unenforceable when the successful party of the arrangement
had no right to the inheritance in the first place. This matter will be addressed in the following section on succession and power in Roman Society.

[441] Sergia's age is never specifically mentioned within Novel 158, but we can clearly infer from the applicable law that she was old enough to speak but had not reached her seventh year.
[442] Miller and Sarris, *The Novels of Justinian*, 989.
[443] *Ibid.*
[444] *Ibid.*

i. Inheritance and Social Power in late Rome

Paul du Plessis argues that property and inheritance were intimately bound in the Roman legal sphere, stressing that the legal facet of property cannot be divorced from its roots in "social, economic and political" factors.[445] The social significance of property can be easily traced into the *Novels* of Justinian because they are styled as remedies to social issues.[446] *Novel 158* has two important social contexts that illustrate the connection between inheritance and society. Firstly, the AD 541 outbreak of bubonic plague is referenced in the preamble. Secondly, there is a flavour of elitism in the structure of *Novel 158* as a successful petition to the Emperor. It can

be inferred that the case concerned an inheritance of valuable property. These social tenets render *Novel 158* exceptional to the normal case. But it is in the exceptional cases, on the periphery of the normal order, that litigation becomes interesting and provides the platform for imperial power to show its hand. Property inheritance was about imperial control, foremostly to maintain social stability in crisis, but also in cultivating a fictitious principle of equality in access to justice.

The legal crux of *Novel 158* is how Justinian deals with the obligation to accept an inheritance within one year (*Codex* 6.30.19) and the age restrictions applied to entitlement to inheritance without a guardian (*Codex* 6.30.18).[447] As stated, the issue is resolved through a caveat made to *Codex* 6.30.18. The appointment of a guardian as pre-requisite to maternal inheritance only applies when over a year has elapsed from the point the heir was able to inherit. The first reports of plague originate from the port of Pelusium in Lower Egypt around AD 541. Although the exact location of Thecla Manos' petition is unclear, the result of the appeal sent to Constantinople is dated AD 544, which suggests that the case facts coincided with an early bout of plague. This is significant because it adds a dimension of crisis to the law of inheritance where adherence to some legal processes would not have been feasible. The plague outbreak increased the likelihood of a child and parent dying within weeks of each other and therefore rendered the condition of appointing a guardian to inherit unreasonable. Therefore, in *Novel 158* Justinian provides an equitable outcome where the outbreak of plague has caused tension in the law of inheritance by amending the applicability of *Codex* 6.30.18.

445 Du Plessis, 'Property', 192-194.
446 Bruce Frier, 'Roman Law's Descent into History'- Review of *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London, 1997), by O.F Robinson and *Roman Law in Context: Key Themes in Ancient History* (Cambridge, 1997)', by David Johnstone, *Journal of Roman Archaeology*, 13 (2000), 448., and Peter Sarris, 'Viewpoint: New Approaches to the 'Plague of Justinian', *Past and Present*, 254: 1 (February 2022), 330.
447 Miller and Sarris, *The Novels of Justinian*, 987.

In the context of the plague, the social need for clarity in the law of inheritance was paramount to stability. The Imperial State interpreted inheritance legislation to adapt to a social issue while denying that there had been any change to existing legislation:

> For the law of Theodosius, of blessed memory, and our law, are not in conflict. Both laws are in the same book and we have stated in a constitution, which we enacted in reference thereto, that it contained nothing contradictory.[448]

Clarifying the law through *Novel 158* stabilised both the rules of inheritance and the mastery of Imperial State where the drafter demonstrates that for the skilled legal interpreter, there are no contradictions to be found in Justinian's law. Juristic science itself therefore formed a part of the imperial order. This is also prevalent where the *Novel* dismisses the arbitration and formal pact between Cosmas and Thecla Manos:

> It is clear that pacts made after a decision with a free person, who was not even able to acquire anything, could not give to Cosmas the right of action on what was contained in such pact.[449]

As demonstrated by the advocate's initial conflicting advice to Thecla Manos and Cosmas, this case raises a potential contradiction in the *Codex* over when a child has claim to maternal inheritance. Allowing a formal agreement recognising Cosmas' claim would admit that *Codex* 6. 30.18 was applicable law, and therefore that two valid, contradictory laws had existed within the *Codex*. Therefore, *Novel 158* is styled as a corrective to the apparently mistaken advocate whose understanding of law must be set to rights by the superior legal process of the Imperial State.

Contemporary legislation distils what was prioritised in periods of crisis and therefore what was of social significance. While there is some revisionist dismissal of the vastness of the impact of the AD 541 plague, Sarris has vehemently discounted these submissions through reference to the "flurry of significant [imperial] legislation" between AD 542-545.[450] The dissemination of the Justinianic *Novels* in community spaces, such as places of worship and the local markets, exhibits the extent of the societal need to understand the law of succession upon death.[451] It would also reinforce the idea that the imperial central bureaucracy remained in operation. The latter is supported by the first legal response to the plague conditions appearing to be concerned with banking.[452]

The petitions for the inheritance of Sergia and the *Novel*'s direct interaction with the Emperor indicates that the property at stake was of considerable value.[453] This conclusion begs the question of whether inheritance

[448] *Ibid.* 988.
[449] *Ibid.*, 989.
[450] Lee Mordechai and Merle Eisenberg, 'Rejecting Catastrophe: The Case of the Justinianic Plague', *Past and Present*, 244:1 (August 2019), 3., and Sarris, 'New Approaches to the Plague', 330.
[451] Kearley, 'Justinian's Novels', 381.
[452] *Ibid.*
[453] Or the inheritance of Thecla, depending on one's position on *Codex* 6.30.18.

was of concern to society irrespective of rank.[454] Frier and McGinn argue that inheritance was definitional of elite status and therefore elites shaped the body of succession law through their easy access to justice.[455] Contention to the exclusive connection between inheritance law and wealth can be found where Gordon argues that in theory, justice was accessible to anybody through the petition and response structure of the late Roman law.[456] Antti Arjava implicitly avoids the conclusion that justice was reserved for elites by noting the scarcity of juristic sources on inheritance queries of smallholders.[457] To establish whether the Imperial State was concerned with general cases of inheritance, a historian might have to go to papyrological documentary evidence and extra-legal sources, while Justinian's *Novels* are largely constricted to appellate cases.[458]

Nevertheless, *Novel 158* depicts the exercise of imperial power through the Imperial State's interest in the appearance of access to justice, if not the reality. The direct addressee of the *Novel* is a high-ranking imperial magistrate, who is receiving his instructions from the Emperor on how the case is to be decided legally, if the facts are found to be as alleged by the petitioner (Thecla Manos). Thecla Manos' petition was published as a source to be studied by the legally trained and as a public pronouncement of the law of inheritance. But the *Novel* also advertises the petition and response system of Justinian's legal process.[459] This system aimed to foster the idea that anyone could write to the Emperor, and in his benevolence, he would save them from the kind of injustice suffered by Thecla Manos during arbitration.[460] The filtered account of legal process and legal reasoning in *Novel 158* contributes to the consolidation of imperial power through inheritance law.

Inheritance and Hierarchy within the late Roman Family

Novel 158 highlights how the law of succession could alter the social positions of family members. The legal quandary within *Novel 158* only occurs because Thecla, and her daughter, Sergia, die intestate. Intestate succession was the exception, rather than the rule in late Roman society.[461] Testacy obscures the blood relationship through the formation of the legal relationship created by the will. In such cases, even if the heir is a blood relation, the blood relationship is rendered surplus to the legal relationship.[462] The imperial court's tacit alteration to the law of succession in *Novel 158* begs the question of how far their power extended where opportunity arose through intestacy cases. This paper suggests that the imperial court dictated the kind of blood that could merit inheritance, meaning imperial power could confer proprietorial value onto some blood relationships over others.

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454 John Crook, *Law and Life of Rome* (New York, 1967), 147.
455 Bruce Frier and Thomas McGinn, *A Casebook on Roman Family Law* (Oxford, 2004), 321.
456 Gordon, 'Succession', 83.
457 Antti Arjava, *Women and Law in Late Antiquity* (Oxford, 1996), 62.
458 For the earlier period of Classical Roman law on property dispute see Bruce Frier, *Landlords and Tenants In Imperial Rome* (Princeton, 1980).
459 The main collection of Novels likely traces its origin to legal instruction in the Schools of Constantinople and Beirut.
460 Miller and Sarris, *The Novels of Justinian*, 988.
461 Caroline Humfress, 'Gift-Giving and Inheritance Strategies in late Roman law and legal practice', in Ole-Albert Rønning, Helle Møller Sigh and Helle Vogt (eds.), *Donations, Inheritance and Property in the Nordic and Western world from late Antiquity until Today* (London, 2017), p. 63., and Gordon, 'Succession', 83.
462 Although, it must be noted that the blood relationship was legally sanctioned via the Justinianic version of the Falcidian portion.

The Roman family was predominantly legal in nature and should be understood as a household encompassing property.[463] Paul du Plessis emphasises that "Roman Law is not modern legal thought" and so by extension, neither are Roman institutions.[464] The institution of the Roman family has been summarised by Frier and McGinn:

> "[Roman] Family law concerns legal aspects of the domestic relationship between persons who are grouped together within a household [...] The overriding concern of Roman family law is not with setting standards for a family's life and internal governance but rather with the implications of family structure for the holding and disposition of property [...] strategies of succession [...] were integral to Roman family law"[465]

The agnatic system emphasised the importance of agnatic blood hegemony over property. The contesting parties in *Novel 158* are the brother and the sister-in-law of the deceased Thecla, and the aunt and uncle of deceased Sergia. Thus, Cosmas' claim to the inheritance rests on his niece's legal existence. Justinian changed the law of intestate succession in AD 543, removing distinction between the male (agnatic) and female (cognatic) lines.[466] Descendants were the immediate heirs, followed by cognatic and agnatic ascendents who were equally entitled, followed by other collaterals.[467] This replaced the classical legal structure of intestate succession favouring the *sui heredes*, the children of the deceased father. [468] The residual precedence of the agnatic line in *Novel 158* demonstrates an overlap between the classical familial hierarchy and the altered succession policy of late antiquity. The agnate's superior status to the cognate was gendered in terms of the blood line from which a person was derived, but they were not personally gendered, unlike systems of primogeniture. The policy was not to do with keeping property out of the control of one gender but rather keeping property within one side of the household.

It has been observed by Gordon that Justinian's revision to the line of succession altered the policy of inheritance law through "increasing recognition of blood relationship" over the agnatic relationship.[469] However, this suggestion overlooks the fact that agnatic principle is a form of blood principle. Justinian altered the law to make blood connection from any line an acceptable pre-requisite for intestate succession. But preference for the agnatic line is also concerned with blood line of a narrower kind. Thus, it is not quite correct to argue that Justinian was entirely substituting policies.[470] The reference to *Novel 118* and the revision to *Codex* 6.30.18 highlight that the Imperial State was able to alter familial hierarchy through the legal definition of blood. This is a significant example of the reach of the state into the private sphere of the household. However, the exchange of agnatic to general blood principle was not a change insofar that the state had always dealt with a kind of blood.

[463] Frier and McGinn, *A Casebook on Roman Family Law*, 4. Note that this property included slaves.
[464] Du Plessis, 'Property', 194.
[465] Frier and McGinn, *A Casebook on Roman Family Law*, 3-6.
[466] Johnstone, 'Succession', 201.
[467] Gordon, 'Succession', 117.
[468] *Ibid.*, 200.
[469] Gordon, 'Succession', 110.
[470] *Ibid.*, 117.

Therefore, the state's power to alter the value of certain kinds of blood against others is indicative of a more extreme form of imperial power over the definition of family.

ii. Inheritance and the Imperial State in late Roman Law

Novel 158 demonstrates how the imperial court functioned, but the *Novel* must be understood as a selective account to create ontological security in the body of law.[471] The nature of the *Novels* constrains any interpretation to foreground the deliberate character of the narrative. Cosmas' claim in *Novel 158* emphasises the importance of blood in the case because it is not grounded in his position as the uncle of Sergia, but as the brother of Thecla. Without Justinian imposing the year long time restriction on *Codex* 6.30.18, the consequence of Sergia being a without a guardian and under seven is that she is to be treated as if she never legally existed.[472] If the imperial court legally invalidated the existence of Sergia, Thecla Manos' relationship to the inheritance becomes a legal relationship rather than a blood relationship. Thecla Manos's position as heir hinges on Sergia's legal existence because they share a blood tie as aunt and niece, whereas Thecla Manos and the deceased Thecla are merely sisters-in-law.

By validating the existence of Sergia and asserting a temporal element to the application of *Codex* 6.30.18, Justinian contributes to the trend in late antiquity that brought reality and the law into conjunction. Property has been characterised as the grammar of inheritance law which serves an "overarching meta-principle [...] such as autonomy, efficiency, equality, or individual flourishing".[473] Justinian's broad interpretation of the law might appear benign and pragmatic, but *Novel 158* is foremostly a case where the imperial court demonstrates the power to decide whether a person legally existed. This is particularly important when the question of legal existence alters the blood relationship upon which an inheritance is predicted.

The implications of imperial power in *Novel 158* are not limited to the legal sphere because there are distinct social repercussions over legal definitions of blood. Latin draws distinction between kinds of blood but broadly, *cognatio*' or 'blood relationship' is understood linguistically to amount to kinship.[474] *Novel 158* is an expression of how this kinship could be controlled by the Imperial State through the power to change what kind of blood merited legal existence and heirship. As previously discussed, a significant policy aim for the publication of Justinian's *Novels* was the consolidation of the fictitious harmony in the constitution. Caroline Humfress has highlighted that the late Roman law of succession allowed testators to support innumerable imperial objectives, including support for the institutional Christian church.[475] Indeed, it was in this realm that "Roman legislators displayed their greatest legal ingenuity".[476] In *Novel 158*, imperial power alters the legal definition and value of blood relationships while supporting its own supremacy through the fiction of harmony.

[471] David Johnstone, 'Introduction', in David Johnstone (ed.), *The Cambridge Companion to Roman Law* (Cambridge, 2015), 3.
[472] Arjava, *Women and Law*, 95.
[473] Carey Miller, 'Property', p. 42., and Thomas Merrill and Henry Smith, 'The Architecture of Property', in Hanoch Dagan and Benjamin Zipursky (eds.), *Research Handbook on Private Law Theory* (Cheltenham, 2020), 1.
[474] Frier and McGinn, *A Casebook on Roman Family Law*, 16.
[475] Humfress, 'Gift Giving and Inheritance Strategies', 21.
[476] *Ibid*., 22.

The extent to which blood was indicative of kinship in late Roman society determines the extent to which kinship was controlled by the Imperial State. The connection between blood and the right to inherit property is rarely accounted for and further academic study of the nature of kinship is required to separate the legal and social definitions.[477] Yet, broadly speaking, intergenerational inheritance is not only consistent internationally within ancient and modern societies, but it is underpinned by a policy of pragmatism, particularly in cases of intestacy.[478] The organic connection between blood and entitlement to property cannot provide an account of blood and kinship separate from legal study. However, it can provide broad conclusions about the importance the Imperial State imputed onto blood relationships in late Roman law.

Conclusion

Novel 158 highlights the extent to which the Imperial State was involved in curating policy through the law, which imputes social significance upon the law of inheritance. After establishing the relationship between social power and succession, *Novel 158* illustrates how the Imperial State controlled the relations of superiority within the family and finally, how the Imperial State controlled the definition of family itself through its control over the value of blood. Omnipresent in *Novel 158* is the presence of state policy or agenda. The *Novel* indicates that inheritance and power in late Roman Law were tightly imbricated. This is because the Imperial State used succession law to further its policy, perhaps rendering the value of blood dubious outside of what the law projected onto it. Natural blood relationships might underpin entitlement to property, but the kind of blood that merited entitlement was in the hands of an Emperor with multiple agendas, the overarching theme being the strengthening of the Imperial State. Thus, Justinian's *Novel 158* contributes to determining the relationship between succession and power by demonstrating the power of the state to control blood relationships through inheritance law.

[477] William Blackstone, *Volume 2 Commentaries on the Laws of England* (Oxford, 1766), 2.
[478] Frier and McGinn, *A Casebook on Roman Family Law*, 321.

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