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INTRODUCTION

FUNDAMENTAL CHANGE – FROM BRACTON TO BLACKSTONE

In the section where writs dealing with the question of personal status are explained, the author of the late twelfth-century English law tract known as *Glanvill* (*c.* 1187) goes into a long discussion about the division between the free and the unfree status.[1] The detailed treatment is viewed by an influential editor of this work as 'some lengthy observations . . . which are outside the limited purpose of a commentary on writs'.[2] But, if anything, such an elaborate treatment shows the great importance the author attached to the division which he might have regarded as fundamental to the law of personal status.

What *Glanvill* failed to spell out with the crispness of a categorical declaration was succinctly expressed a few decades later by an able hand known by the name of Bracton. Students and practitioners of the common law in the thirteenth and fourteenth centuries must have admired the penetrating insight and clarity of expression of this celebrated author when they were reading the following passage from his *De legibus et consuetudinibus Angliae* (*c.* 1220–50):

> The primary division in the law of personal status is simply that all men are either free or unfree (*serui*).[3]

[1] *The treatise on the laws and customs of the realm of England commonly called Glanvill*, ed. G. D. G. Hall, reprinted with a guide to further reading by M. T. Clanchy (Oxford, 1993) lib. 5. Glanvill refers to the unfree persons as *natiui* or *aliqui in uilenagio*.
[2] Ibid., p. xxiii.
[3] *Bracton on the laws and customs of England*, trans. Samuel Thorne, 4 vols. (Cambridge, Mass., 1968–77) II, p. 29 ('Est autem prima divisio personarum haec et brevissima, quod omnes homines aut liberi sunt aut serui').

The author of *Fleta* (*c.* 1290) was no doubt deeply impressed by the cardinal importance of this division. Accordingly, its very first chapter was devoted to introducing this principle.[4] *Britton* (*c.* 1292) largely followed the example of *Glanvill* in so far as the law of personal status is concerned. In the chapter dealing with the condition of villeins, the author revealed his outlook which was wholly based on the division between the free status (*fraunchise*) and the unfree status (*servage*).[5] However, *Britton* did not go as far as the *Mirror of justices* (*c.* 1290) whose author argued that the unfree status was ordained from time immemorial by divine law, accepted by human law and confirmed by the Canon law.[6] In France also, this basic principle of the law of personal status seems to have been upheld with equal respect during the same period. *Li livres de jostice et de plet*, which was written in the latter half of the thirteenth century, contains the following passage:

> The good division of the law of persons is that all men are either free or servile (*serf*).[7]

Of course, the passages quoted above, as well as the principle expressed therein, came from Justinian's *Corpus Iuris* and medieval scholars' glosses and commentaries of this sixth-century compilation of the Roman law. The compilers of Justinian's *Digest* indicated that the principle was expounded by Gaius, who taught law in the second century. Thanks to the discovery of an almost complete fifth-century manuscript of Gaius' *Institutes* in the library of the Cathedral of Verona in 1816, we have his original phrase which is virtually identical to the above-quoted passage of Bracton.[8] For the late medieval readers of *Bracton* and *Britton* who accepted the principle of Gaius as a succinct and cogent statement of the law of personal status, the lapse of a millennium does not seem to have brought about much change.

This is not to say that the law of personal status remained

[4] *Fleta*, vol. II, 72 Selden Society (1955) lib. 1, c. 1.
[5] *Britton*, ed. Francis M. Nichols, 2 vols. (Oxford, 1865) I, pp. 194–210.
[6] *The mirror of justices*, 7 Selden Society (1893) p. 77.
[7] *Li livres de jostice et de plet*, ed. Pierre N. Rapetti (Paris, 1850) p. 54 ('La bone devise de droit des persones, des gens, est tele que tot homes ou il sont franc ou serf').
[8] *The Institutes of Gaius*, ed. E. Seckel and B. Kuebler, trans. W. M. Gordon and O. F. Robinson (Ithaca, N.Y., 1988) 1, 9 ('Et quidem summa diuisio de iure personarum haec est, quod omnes homines aut liberi sunt aut serui'). The passage found its way into Justinian's *Digest* (1. 5. 3) and *Institutes* (1. 3. pr).

unchanged in all its details. Nothing can be further from the truth. Behind its seemingly timeless façade, the terse statement of Bracton conceals the vast political, economic and social changes that transformed Europe from Antiquity to the Middle Ages. Just one example should be sufficient to demonstrate this point. As shown in the passage quoted above, the author of *Li livres de jostice et de plet* did not hesitate to translate 'serui' into 'serf'. By doing so, the French author plainly revealed one of such changes which had been left less explicit by the Latin language in which Bracton's work was written. That is, slavery, as an economic institution, was no longer viable in late medieval England and northern France. In other words, the 'serui' in *Bracton* and *Fleta* were not the same 'serui' to whom Gaius referred.[9]

What I would like to point out, however, is that the basic framework of viewing and analysing interpersonal legal relationships remained unchanged throughout this long period. Precisely who belonged to the category of *liberi*? What exactly were the legal capacities and disabilities of those classified as *serui*? How easy or how difficult was it to move from one category to another, and what were the procedures for doing so? Answers to these questions will vary widely depending on the numerous changes, big or small, which took place constantly since Gaius wrote his *Institutes*. Already by the sixth century, the compilers of Justinian's *Institutes* were noting the legislative reforms introduced in regard to the category of *libertini* (freed men).[10] But, from Gaius' time all the

[9] However, slavery persisted in Spain, Portugal, southern France and the Italian cities throughout the Middle Ages. See Iris Origo, 'The domestic enemy: the eastern slaves in Tuscany in the fourteenth and fifteenth centuries', 30 *Speculum* (1955) 321–66; William D. Phillips, Jr, *Slavery from Roman times to the early transatlantic trade* (Minneapolis, 1985) pp. 88–113. One can therefore argue that Azzo of Bologna, for example, might have understood 'serui' quite differently from his admirers in northern Europe such as Bracton. For an explanation that slavery gave way to various forms of servitude in medieval France and that, by the eleventh century, 'servus' came to mean a serf, see Charles Verlinden, *L'Esclavage dans L'Europe médiévale*, 2 vols. (Bruges, 1955) I, pp. 729–47; Marc Bloch, 'Liberté et servitude personnelle au moyen âge, particulièrement en France: contribution à une étude des classes' in his *Mélanges historiques*, 2 vols. (Paris, 1963) I, pp. 286–355 (English translation in *Slavery and serfdom in the Middle Ages: selected essays*, trans. W. Beer (Berkeley, 1975)).

[10] *Inst*. 1. 5. 2. Compare it with Gaius, *Institutes*, 1. 12–47. The reforms concerned the categories of *latini Iuniani* and *peregrini dediticii* which were abolished by successive legislative measures including the famous *Constitutio Antoniniana* of 212. Emperor Caracalla's *Constitutio* of 212 is commonly depicted as a general

way down to the era of *Glanvill*, *Bracton* and *Britton*, the primary tool for analysing legal relationships among human beings was the *varying amount* of privileges and franchises a person was allowed to enjoy.

The close connection between *Bracton* and medieval Roman law was noted by Carl Güterbock in the nineteenth century. F. W. Maitland and H. Kantorowicz took up this issue again and demonstrated exactly how much this thirteenth-century English law tract was influenced by Azzo of Bologna's *Summa* to Justinian's *Code* and *Institutes*.[11] However, what these authors did not bring out adequately is that it was the essential similarity of outlook on personal legal status which allowed Bracton to borrow what he did from Justinian's *Corpus Iuris* and Azzo's *Summa*. The important issue about the work of Bracton is not to prove or disprove the so-called civil law 'influences' or the English 'originality'. We must stress the firm and undeniable *continuity* of legal reasoning that had been maintained for over a thousand years.

Our argument will become clearer when we look at how the basic framework of legal reasoning changed since Bracton. Some 500 years after him, we encounter the following statement of Blackstone:

> The first and most obvious division of the people is into aliens and natural-born subjects.[12]

Of course, Blackstone was summing up, as Gaius probably did in the second century, several centuries of legal development that went on before him. In *Calvin's case* (1608), for instance, Francis Bacon argued that 'there be but two conditions by birth, either alien or natural born'. The then Chief Justice Sir Edward Coke also stressed that 'Every man is either *alienigena*, an alien born, or

naturalisation legislation. But I doubt whether the modern legal concept of alien status may be used in analysing the legal status of *latini Iuniani* and *peregrini dediticii*. See below pp. 11–12, 189–96.

[11] Carl Güterbock, *Henricus de Bracton und sein Verhältniss zum Römischen Rechte* (Berlin, 1862); *Select passages from the works of Bracton and Azo*, 8 Selden Society (1894); H. Kantorowicz, *Bractonian problems* (Glasgow, 1941); H. G. Richardson, 'Azo, Drogheda, and Bracton', 59 *English Historical Review* (1944) 22–47.

[12] William Blackstone, *Commentaries on the laws of England*, 4 vols. (Oxford, 1765–69) I, p. 354.

subditus, a subject born.'[13] Bacon and Coke were also riding on the shoulders of their predecessors.

The change was certainly observable in *De laudibus legum Anglie* (*c.* 1468–70) where John Fortescue expressed some degree of uneasiness about servitude. He wrote:'Hard and unjust (*crudelis*), we must say, is the law which increases servitude and diminishes freedom, for which human nature always craves; for servitude was introduced by man on account of his own sin and folly, whereas freedom is instilled into human nature by God.'[14] Unfree status was already viewed as contrary to nature by Roman jurists of the Classical period.[15] Nonetheless, it was wholeheartedly accepted as provided by *ius gentium*. But Fortescue was raising moral doubts not only against the unfree status as such, but also against the law which institutionalised it (*'crudelis' . . . lex*). Such an attack certainly explains the disapproval and eventual demise of the legal approach which relies on the division between the free and the unfree status. Undoubtedly, legal reasoning was to move along the path leading to the notion of equality. But Fortescue's work indicates that lawyers would not have to deal with an equality which was boundless. In his work, men were viewed as 'bundled up' in units. Each such unit was portrayed as a mystic body, of which the king was the head. He wrote: 'Just as from the embryo grows out a physical body controlled by one head, so from the people is formed the kingdom, which is a mystic body governed by one man as the head.'[16] Then he went on to explain that the law (*lex*) was responsible for the internal cohesion and unity of the mystic body of kingdom:

> The law, by which a group of men is made into a people, resembles the nerves and sinews of a physical body, for just as the physical body is held

[13] See below, p. 186.

[14] Our translation is based on Sir John Fortescue, *De laudibus legum Anglie*, ed. and trans. S. B. Chrimes (Cambridge, 1942) pp. 104–5 ('Crudelis etiam necessario judicabitur lex, quae servitutem augmentat, et minuit libertatem; nam pro ea Natura semper implorat humana. Quia ab homine, et pro vicio, introducta est servitus; sed libertas a Deo hominis est indita nature').

[15] See Florentinus' famous definition of slavery: 'Slavery is an institution of *ius gentium* whereby one is against nature subjugated to the ownership of another (*servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur*).' *D.* 1. 5. 4. Justinian's *Institutes* repeats this definition. *Inst.* 1. 3. 2.

[16] *De laudibus legum Anglie*, ed. and trans. Chrimes, p. 30 ('sicut ex embrione corpus surgit phisicum, uno capite regulatum, sic ex populo erumpit regnum, quod corpus extat misticum uno homine ut capite gubernatum').

together by the nerves and sinews, so this mystic body [of people] is bound together and united into one by the law, which is derived from the word '*ligando*'.[17]

As I shall argue in this book, the moral and legal structure of the kingdom envisaged by Fortescue lies at the core of the new approach to the personal legal status.

An unequivocal statement of the new approach can also be found in Thomas Littleton's *Tenures* (*c.* 1450–60). In explaining the tenure in villenage, Littleton enumerates six categories of persons who are debarred from bringing real or personal actions.[18] It does not surprise us to see that villeins are included in the list. What is surprising is the way in which Littleton explains such legal disability. In *Old tenures*, we find the following statement: 'Note that a villein can have three types of actions against his lord, i.e., the appeal of *mort d'ancestor*, the appeal of rape done to his wife, and the appeal of maim.'[19] The same rule is repeated by Littleton. But he says it in a completely different manner: 'Note that a villein is able and free to sue all manners of actions against any person except against his lord of whom he is a villein. Even then, certain actions can be brought by a villein against his lord [then follow the three types of actions explained in *Old tenures*].'[20] Legal disability used to be the rule. Littleton now depicts it as an exception. Of course, it would be wrong to imagine that the era of legal inequality was over by the fifteenth century. But what is evident is that the contemporary lawyers such as Fortescue and

[17] Ibid. ('Lex vero, sub qua cetus hominum populus efficitur, nervorum corporis phisici tenet racionem, quia sicut per nervos compago corporis solidatur, sic per legem, quae a *ligando* dicitur, corpus hujusmodi misticum ligatur et servatur in unum').

[18] Edward Coke, *The first part of the Institutes of the laws of England; or a commentary upon Littleton* (Coke on Littleton), 18th edn, 2 vols. (London, 1823), I, 127b–135b (§§ 196–201).

[19] The compilation of *Old tenures* is often ascribed to the reign of Edward III. The text was printed in the early sixteenth century by several law printers. The quotation which I translated is from the following passage: 'nota que villeyn poet aver trois accions envers son seignour, scilicz, Appele de mort son aunc., Appele de rape fait a sa feme, et Appele de mayhayme.'

[20] Coke on Littleton, 123b (§ 189). T. Littleton, *Tenures*, printed by R. Pynson (London, *c.* 1510) fo. xiv (r): 'Nota chescun villein est able et franke de suer toutes maners des accions envers chescun person, forspris envers son seignour a que il est villeyn. Et uncore certaines accions il poet aver envers son seignour . . .'

Littleton were already treating the legal regime of inequality as if it was an embarrassing exception to their legal ideals.

Littleton's explanation merits a closer examination. As a class of persons who are debarred from bringing lawsuits, aliens are listed together with the villeins, those who are outlawed, those who are judged to be out of the king's protection, those who are excommunicated, and the religious who are deemed to be dead in secular law. Littleton explains that a person cannot bring lawsuits while under outlawry because the person is 'outside the law (*hors de la ley*)' to demand legal remedies during the period. Those judged to be out of the king's protection are also debarred from bringing lawsuits because 'the law and the king's writs be the things, by which a man is protected and helpen, and so, during the time that a man in such case is out of the king's protection, he is out of helpe and protection by the king's law, or by the king's writ'.[21] Obviously, the legal structure of the kingdom envisaged by Fortescue is deeply embedded in the mind of Littleton. The kingdom is viewed as a network of law branching out from the king. Aliens are portrayed as persons born out of this network (*hors de la liegance nostre seignor le roy*), hence out of the protection.

Littleton's explanation is conceived entirely in terms of the abstract notions of the king's law and the king's protection. It is a clear departure from concrete privileges and itemised franchises (*libertates*) which defined a person's legal condition in the Middle Ages. Littleton's notion of the king's law and protection could easily be understood to permeate evenly throughout the realm, thereby homogenising the legal conditions of the king's subjects. When Edward Coke argued in *Calvin's case* that 'the protection and government of the king is general over all his dominions and kingdoms', he was pursuing a conclusion whose direction was already set by Littleton.[22] For over a thousand years since Gaius, lawyers engaged in an analysis of personal legal relationships had been habitually asking the question, 'How free are you?' Littleton left no doubt that the long reign of Gaius' *summa diuisio perso-*

[21] Coke on Littleton, 129b (§ 199). Littleton, *Tenures*, fo. xiv (r): 'le ley et les briefes le roy sont les choses par queux homme est protecte et aide et issint durant le temps q home en tiel cas est hors de protec . . .'

[22] See below, p. 179.

narum was over. The new question to be asked persistently is 'Are you in, or are you out?'

The French Revolution dealt a fatal blow to the regime of legal inequality. All forms of inequality known to law were to be abolished in the name of liberty, equality and fraternity. But the enchantment of the revolutionaries went on even after the *summa diuisio* of Gaius was dismantled. Imbued with revolutionary zeal, the *Assemblée nationale* abolished the division based on nationality as well. In 1790, the so-called *droit d'aubaine*, which by then referred to various legal disabilities of aliens in France, was unconditionally abolished 'with regard to all the peoples of the world'.[23] However, their aspiration for boundless equality proved to be a short-lived episode without any durable impact. The reform was quickly undone by Napoleon.[24]

The latest restatement of the legal approach expounded by Fortescue and Littleton can be found in an article which is commonly inserted in various international conventions on human rights drafted in the twentieth century. For example, Article 2 of the Universal Declaration of Human Rights (1948) provides: 'Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[25] National origin, of course, does not mean nationality. The absence of nationality in this long list of criteria which *cannot* justify legal discrimination must not go unnoticed. Indeed, Article 16 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms expressly provides that 'Nothing in Articles 10, 11, and 14 [Non-discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.' All kinds of discrimination *except* the ones based on nationality are condemned. In fact, the

[23] 'Que la France libre doit ouvrir son sein à tout les peuples de la terre en les invitant à jouir . . . des droits sacrés et inviolables de l'humanité . . .' (Law of 6 August 1790). Philippe Sagnac, *La Législation civile de la Révolution française, 1789–1804: essai d'histoire sociale* (Paris, 1898) p. 252. For a searching analysis of the vicissitudes of the political argument behind this legislation, see Sophie Wahnich, *L'Impossible citoyen, l'étranger dans le discours de la Révolution française* (Paris, 1997).

[24] Paul Viollet, *Précis de l'histoire du droit civil français* (Paris, 1905) p. 414.

[25] Paul Sieghart, *The international law of human rights* (Oxford, 1983) p. 263.

new approach is so deeply ingrained in our minds that often we do not even use the word 'discrimination' to describe the differential legal treatment based on nationality. This is where we stand and it is not very far from where Littleton or Fortescue stood. Somewhere between Bracton and Littleton, therefore, there must have been a change of legal outlook. I believe it was not a minor change.

THE BEGINNING

This book examines the beginning of the law of alien status in medieval England because, in my view, it shows how the focus of European legal analysis shifted from *status* to the *State*. I have argued that just as Bracton represented an era where legal reasoning was based on the division between the free and the unfree status, so Sir John Fortescue and Thomas Littleton represent the new age where the legal relationship among human beings is conceptualised with constant reference to the allegiance to a political unit (a kingdom or a State). Precisely when and in what context clear indications of this change began to appear in England constitutes the main question which I propose to answer.

The assumption that meaningful historical inquiries can be made into the beginning of the law of alien status should not require lengthy justification as it is no longer seriously argued that systematic legal discrimination against aliens has existed from time immemorial.[26] Nevertheless, certain aspects of the assumption require clarification.

1. The 'beginning' presupposes a lack until the moment of beginning. But the lack of the law of alien status may not be explained by an absence of foreigners. No society has ever lacked the actual or potential presence of foreigners by means of which the group identity of its members can be formed and sharpened.
2. Nor does the lack of the law of alien status indicate the absence of the *psychological* category of foreigner. The division between 'we' and 'they' lies at the very core of human perception of the self. The words 'we' and 'they' themselves are the most

[26] This, however, seems to have been the prevalent opinion in the sixteenth and seventeenth centuries. See below, chs. 7 and 8.

eloquent evidence of such a cognitive mechanism which can never be transcended as long as human beings use language to define and express their perception. No doubt, *extranei, alienigenae, alienes, advenae* had been in common use ever since the Antiquity.[27] But the existence of such vocabulary should not be treated as evidence of a legal system based on the notion of alien status. As we shall see, the legal condition of foreign merchants (*mercatores alienigenae*) in medieval England was not so much determined by their foreign provenance as by their status as merchant free-men. Even though the perception of foreignness was expressed by the epithet *alienigena*, no definite set of privileges or disabilities was attributed to the quality of foreign provenance *per se*. I shall also argue that the legal condition of the foreign clergy in medieval England was not greatly affected by their foreign provenance either. The fact that they were not English was again clearly noted and expressed, but it did not have any immediate legal consequence until the moment which we consider as the starting point of the law of alien status. There is no historical beginning or end to human perception of the division between the self and the other. But the legal system based on a systematic discrimination against aliens is a historical phenomenon. Although its end is yet to be witnessed, its beginning was clearly observable in the course of European legal development.

3. Perception of the self and the other takes place at various levels. In many cases, such psychological perception is translated into a legal category. For instance, 'we' may refer to the burgesses of a particular town. Of course, it was a legal category whose membership was linked to the enjoyment of clearly defined privileges and franchises. 'We' may be the *omnes fideles* of the king. Its existence as a legal category throughout the Middle Ages is evidenced by countless writs and letters patent which were directed to *omnibus fidelibus suis*. Also, 'we' may refer to those who were under the jurisdiction of a particular bishop or parson as opposed to those coming from another

[27] *Thesaurus Linguae Latinae*, vol. I (Leipzig, 1903) and *Mittellateinisches Wörterbuch*, vol. I, fasc. 3 (Munich, 1960) list the recorded occurrences of the word *alienigena* from various Classical (up to AD 600) and medieval (up to the thirteenth century) sources. Of course, topographical names also express the perception of the self and the other.