ALIENS IN MEDIEVAL LAW

THE ORIGINS OF MODERN CITIZENSHIP

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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK http://www.cup.cam.ac.uk
40 West 20th Street, New York, NY 10011–4211, USA http://www.cup.org
10 Stamford Road, Oakleigh, Melbourne 3166, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain

First published 2000

Printed in the United Kingdom at the University Press, Cambridge

Typeface Imprint 10/12 pt *System* 3b2 [CE]

A catalogue record for this book is available from the British Library

ISBN 0 521 80085 4 hardback

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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.

bishopric or parish.[28] Of course, this list is not exhaustive. Our assumption about the beginning of the law of alien status must not be regarded as denying the existence of *any* of these legal categories during the period lying before the beginning. Existence of a concept does not determine its use or usefulness for legal reasoning. For instance, the concept of equality was always in existence. But whether and how it will be used in resolving disputes over distribution of resources will depend entirely on the particular approach adopted by members of the legal profession of a given time. Similarly, the existence of the legal concept of *fidelis* or *alienigena* should not, and need not, be denied in order to explain the contemporaneous lack of the law of alien status. The beginning of the law of alien status must not be confused with the emergence of an identifiable unit of government which makes use of the concept of *fideles* and *alienigenae*. Our aim is to explain rather the end, than the beginning, of a medieval state by examining the rise of the law of alien status, which I consider as the distinctive feature of the modern State. In short, our assumption about the 'beginning' *presupposes* the existence of the categories and the vocabulary of *fideles* and *alienigenae* rather than denying them.

4. The quest for the beginning of the law of alien status, then, is not a matter of locating the first occurrence of the term 'alien' in legal discourse. Nor do I believe that there is any ground to suppose a medieval 'revival' of the ancient legal rules for the treatment of foreigners.[29] Any attempt to isolate the term alien (or its equivalent) from the rest of the legal vocabulary and to trace its beginning or revival is bound to end up in a sterile exercise of antiquarianism. Meanings are not something that can be ascertained apart from the network of semantic

[28] Regarding the concepts of *incola, advena, vagus* and *peregrinus* in the medieval Canon law, see W. Onclin, 'Le statut des étrangers dans la doctrine canonique médiévale' in *L'Etranger*, part 2 (Brussels, 1958) pp. 37–64.

[29] For ancient Greek and Roman legal rules for the treatment of foreigners, see Raoul Lonis, *La Cité dans le monde grec: structure, fonctionnement, contradiction* (Paris: 1994) pp. 71–80; François Jacques and John Scheid, *Rome et l'intégration de l'empire, 44 av. J. C. – 260 ap. J. C.*, vol. I, *Les Structures de l'empire Romain* (Paris: 1990) ch. 6; Claude Nicolet, *Le Métier de citoyen dans la Rome républicaine*, 2nd edn (Paris: 1976) pp. 31–70; D Whitehead, *The ideology of the Athenian Metic* (Cambridge, 1977); R. Lonis (ed.), *L'Etranger dans le monde grec*, 2 vols. (Nancy, 1988, 1992).

relationships in which terms are put to use. Although the term 'alien' or its equivalent has always been in use, the *way* it is incorporated and used in legal argument is not always the same. To explain the *changing ways* of using alien and other related legal terms, therefore, is what I propose to do in this book. In my view, the beginning must be sought in the changing priority among various layers of *divisiones personarum*, with which lawyers express their perception of the self and the other. For Roman jurists, for example, the division between foreigners and non-foreigners was not as significant as the division between free-men and slaves, which was their *summa divisio personarum*. But today's lawyers would easily accept that the division between subjects and aliens is the most important *divisio personarum* which supersedes all other possible *divisiones personarum* one can envisage (divisions based on sex, age, lineage, family status, certain physical or cultural features, wealth, etc.). This shift of priority is what we understand as the beginning of the law of alien status. Thus understood, the history of the beginning of the law of alien status cannot, and must not, be a story of the 'fall' from the original, pristine innocence – where men were supposedly ignorant of the division between 'we' and 'they' – into the sinful knowledge of the vertiginous division separating 'us' from 'them'. My goal is rather mundane. I simply aim to examine how certain component-parts of the legal vocabulary have been re-shuffled and re-aligned in the fourteenth century, and how some of them have, as a result, acquired new relevance and new eloquence.

So far, legal historians have generally accepted the following remarks of Professor Maitland as a plausible explanation of the beginning of the English law of alien status:

> [F]eudalism is opposed to tribalism and even to nationalism: we become a lord's subjects by doing homage to him, and this done, the nationality . . . and the place of our birth are insignificant. In England, however, a yet mightier force than feudalism came into play. A foreigner . . . conquered England, became king of the English, endowed his followers with English lands. For a long time after this there could be little law against aliens, there could hardly be such thing as English nationality . . . It is, we believe, in the loss of Normandy that our law of aliens finds its starting point.[30]

[30] F. Pollock and F. W. Maitland, *The history of English law before the time of Edward I*, 2nd edn, reissued with an introduction by S. F. C. Milsom, 2 vols.

The allusion to feudalism needs careful interpretation. Whether feudalism was actually against the establishment of a central government is still highly debatable. In an article summarising the most recent historical studies on feudalism in France, Professor Giordanengo argues: 'No one believes any more . . . that the very existence of the inter-personal [feudal] relationships would necessarily lead to the destruction of public authority or that its establishment would at least be hampered by those relationships, and the old expression 'feudal anarchy' makes one smile.'[31] He stresses that the oath of fidelity to the political ruler, as distinct from the feudal rite of homage, was a widespread practice vigorously maintained all over France throughout the Middle Ages.[32] This is a strong warning against the tendency to conceptualise the interpersonal legal relationships existing in a feudal monarchy by means exclusively or mainly of the tenurial relationship of homage. All medieval English law tracts also contain passages which suggest the unstinted importance of the relationship of fidelity between the king and his subjects, as distinct from the personal feudal relationship between the king and his tenants. *Glanvill*, for instance, stated that the rite of homage to mesne lords must be accompanied by a proviso saving the fidelity to the king (*salua fide debita domino regi et heredibus suis*).[33] In short, the importance of homage in feudal society did not necessarily weaken the bond between the king and his subjects (*fideles*). Professor

(Cambridge, 1968) I, pp. 460–1. Also ibid., I, p. 91 ('a King of the English who was but duke of the Normans was interested in obliterating a distinction which stood in his way if he was to be king of England'). Holdsworth quotes most of Maitland's explanation and repeats his view. W. S. Holdsworth, *A history of English law*, vol. IX (London, 1926) pp. 72–4. F. M. Powicke, *The loss of Normandy, 1189–1204* (Manchester, 1913) pp. 422ff. is responsible for the wide propagation of this view among other historians. See the bibliographical note at p. 228 below for a list of works dealing with the history of the law of alien status. All of them are based on an acceptance of Maitland's explanation.

[31] Gérard Giordanengo, 'Etat et droit féodal en France (XIIe.–XIVe siècles)' in *L'Etat moderne: Le droit, l'espace et les formes de l'état*, ed. N. Coulet and J.-P. Genet (Paris, 1990) pp. 64–5. For similar conclusions, see Jean Barbey, *Etre roi: le roi et son gouvernement en France de Clovis à Louis XVI* (Paris, 1992) pp. 111–12; Eric Bournazel and Jean-Pierre Poly, *La mutation féodale*, 1st edn (Paris, 1980) p. 276; Jacques Le Goff (ed.), *L'Etat et les pouvoirs, histoire de la France*, vol. II (Paris, 1989) p. 101.

[32] Giordanengo, 'Etat et droit féodal', p. 64.

[33] *Glanvill*, lib. 9, c. 1. *Bracton* and *Britton* also agree on this point. For a detailed discussion, see Keechang Kim, 'Etre fidèle au roi: XIIe–XIVe siècles', 293 *Revue Historique* (1995) 225–50.

Maitland's carefully worded suggestion that under feudalism, nationality was 'insignificant' for resolution of disputes involving foreigners, should not be construed as suggesting the absence or general unimportance of the concept of *fidelis* in the feudal monarchy of England.

The reference to the Norman Conquest may require some reconsideration. As far as medieval lawyers were concerned, the Conquest did not entail the process of 'nation building'. The legal relationship between Englishmen and the new kings from Normandy posed no new problem because Norman kings claimed to be the legitimate successors to the king of the English (*rex Anglorum*). The Normans remaining in Normandy did not automatically become English simply because their duke acquired the kingship over Englishmen. Their legal status remained the same as before. They were no different from other Frenchmen who were ruled by territorial princes of medieval France.[34]

However, those who came over from the Continent and settled down in England were identified as *Franci*, and were included among the *omnes fideles* of the king of the English. Many writs and charters issued in post-Conquest England were directed to *omnibus fidelibus suis, Francigenis et Angligenis*.[35] It is wrong to imagine that here the *Franci* or the *Francigenae* referred to Frenchmen in general. Writs and charters had clearly defined geographical and personal limits within which they were effective. The king of the English during that period had no claim over Frenchmen in general. Only the new settlers in England were referred to by the term *Franci*. To this extent, the scope of the king's *fideles* underwent a slight change as a result of the Conquest. But this does not mean that the distinction between peoples became any more difficult or insignificant. Rather, the Conquest actually sharpened the distinction as evidenced by the appearance of the legal rules dealing with their interrelationships.[36] For

[34] As subjects of the duke, Normans would eventually be subject to the French king's territorial claim over his kingdom. See Paul Jeulin, 'L'Hommage de la Bretagne . . .', 41 *Annales de Bretagne* (1934) 380–473.

[35] *Royal writs in England from the Conquest to Glanvill*, 77 Selden Society, (1958–9) Appendix, *passim*; *Cartulary of the Abbey of Ramsey*, Rolls series, 3 vols., ed. W. H. Hart and A. L. Ponsonby (1884–93) *passim*.

[36] George Garnett, '"Franci et Angli": the legal distinctions between peoples after the Conquest' in *Anglo-Norman studies*, ed. R. Allen Brown, vol. VIII (Woodbridge, 1986) p. 118.

Englishmen of the time, the Normans were only one of various groups of foreigners they came in contact with, peacefully or militarily. Foreign merchants, foreign monks and foreign clerics kept coming to England throughout the Middle Ages not only from Normandy but from all over the Continent. For the Norman rulers who came to England, on the other hand, the legal concept of *fidelis* was crucially important for the administration of the newly acquired territory. There is no ground to assume that inclusion of *Franci* in the *omnes fideles* of the king of the English made the concept of *fidelis* insignificant or unsuitable for legal purposes. We reject the suggestion that the psychological perception of ethnic identities or the legal concept of *fidelis* was blurred by the Norman Conquest or sharpened by the loss of Normandy.[37]

Maitland was not the first to attribute the beginning of the English law of alien status to the loss of Normandy. He was repeating a view which had been regarded as axiomatic since the latter half of the seventeenth century.[38] However, such a view is responsible for some unfortunate results. First, the development of the English law of alien status is portrayed as a uniquely English phenomenon which had nothing to do with the European legal development. Second, the beginning of the law of alien status is described as a strictly juridical process explainable wholly in terms of precedents and their judicial interpretation. It is high time that we discarded this view and examined the history of the English law of alien status from a fresh perspective.

THE EUROPEAN PERSPECTIVE

Conjectures surrounding the consequences of the Norman Conquest and the loss of Normandy have prevented the history of the English law of alien status from being studied on the broader

[37] The differential legal treatment between ethnic groups in post-Conquest England, which is observable in the institution of murder fine and Englishry, had little to do with the question of alien status. The king's *fideles* comprised men and women of widely different legal status. The disparity of legal status between *Franci* and *Angli* was just *one* of many examples of legal inequality which existed *among* the king's *fideles*. See Garnett's work cited above.

[38] See below, p. 187, for the beginning of this historiographical tradition.

horizon of European legal development. Instead, the beginning, and the lack until the beginning of the law of alien status have been explained with reference to the fortuitous events that England was conquered by the Normans and that the descendants of the conquerors happened to lose their overseas possessions at some point. One wonders whether other European kingdoms, which did not share the same military fortune with England, could ever have the beginning of their law of alien status. Also, any war fought at any time has the potential to sharpen the group identity of the parties involved. One wonders again why the law of alien status appeared, if it did, at that particular moment in English history rather than much earlier or later. Attributing the beginning of the law of alien status to the loss of Normandy made it impossible to appreciate the historicity of the law of alien status.

Military confrontation, therefore, is not a fruitful place to look for the beginning of the law of alien status. The beginning must instead be sought in the shift of focus in the law of personal status from concrete, itemised and marketable *libertates* and *privilegia* to the abstract notion of political faith and allegiance. The new approach marked the end of an era in European legal development and opened up a new age where the kingdom or the State became the constant and ultimate point of reference by means of which an individual's identity is legally defined, and interpersonal relationships are legally analysed. The emergence of the English law of alien status must be viewed as a 'European' event whose novelty and historicity must be studied from a European perspective. It had nothing to do with the Norman Conquest or the loss of Normandy.[39]

[39] There is a considerable amount of literature stressing the merits of comparative history. Marc Bloch, 'Pour une histoire comparée des sociétés européennes', 46 *Revue de Synthèse Historique* (1925) 15–50; W. H. Sewell, 'Marc Bloch and the logic of comparative history', 6 *History and Theory* (1967) 208–18; G. M. Frederickson, 'Comparative history' in *The past before us*, ed. M. Kammen (Ithaca, 1980), pp. 457–73; John Elliott, 'National and comparative history', an inaugural lecture in the Oxford University, 10 May 1991. The necessity for a European approach to legal history in particular is strongly argued in Reiner Schulze, 'European legal history – a new field of research in Germany',13 *Journal of Legal History* (1992) 270–95. For a concise explanation of why the study of the birth of European modern States must take account of the changes appearing not only in one particular country but all over western Europe in the late Middle Ages, see the introduction by J.-Ph. Genet in *L'Etat moderne: genèse – bilans et perspectives* (Paris, 1990).

THE INTER-DISCIPLINARY APPROACH

Basing themselves on the assumption that the beginning of the law of alien status must be viewed as the appearance of sharpened psychological and legal categories (allegedly resulting from the loss of Normandy), legal historians have searched for precedents to which the appearance of such categories may be attributed. Once the beginning was located by means of (a) precedent(s), the rest of the story would then be told entirely in terms of how narrowly or widely the precedents were interpreted by later generations of lawyers and judges. Thus, Professor Maitland argues that the war-time 'dilatory' exception against French enemies – which only had the effect of postponing the lawsuit until the war was over – gradually transformed itself into the permanent 'peremptory' exception against aliens in general (conclusively barring their lawsuit regardless of war).[40] Similarly, the precedents of temporary seizures of the Normans' lands upon the loss of Normandy are thought to have somehow transformed into a general law of alien treatment as the military confrontations with French kings dragged on.

It is true that neither the dilatory exceptions nor the seizures of the Normans' lands are viewed in themselves as the examples of the law of alien status. They are offered as the precedents containing, as it were, a germ for the metamorphosis. The precise moment of the beginning of the law of alien status is therefore lost somewhere in the development process which is described as 'an exaggerated generalization' of the precedents. Nevertheless, the beginning – understood as a concoction of judicial manoeuvring of precedents – is believed to be lying wholly within the realm of legal logic.[41]

In my view, the beginning of the law of alien status was not the result of the appearance – whether gradual or abrupt – of new psychological or legal categories. The beginning must be explained by a *changed use* of the known categories and concepts such as faith and allegiance to the king. The new way of using the old concepts was made possible because the analysis of

[40] The 'dilatory' exception postponed the suing of the claim only until the cessation of the hostilities. *Bracton*, III, 361 (fo. 298), IV, 292 (fo. 415 b), IV, 328–9 (fo. 427 b), IV, 331–2 (fo. 428 b).

[41] Pollock and Maitland, *The history of English law*, I, 462–3.

personal legal relationships began to be conducted on an entirely different platform. It was a change of paradigm. Such a change does not form part of the textual contents of legal discourse. Rather, it was a change of the non-discursive context in which the legal discourse of the time was practised. Therefore, the beginning itself cannot be explained by precedents or their judicial interpretation. It lies outside. Herein lies the need for an inter-disciplinary study. At the same time, although the beginning itself may lie outside the realm of legal logic, its indications can be observed in precedents and they may be studied to illuminate the history of the law of alien status. To this extent, the study of our topic has something to offer to – and just as much to learn from – those who are investigating various institutional and intellectual changes of late medieval Europe, of which legal change was an integral part. If an interdisciplinary study between legal history and social and political history is at all possible, we would not be able to find a more appropriate topic anywhere else.[42] So far, such an enterprise has been impossible because the orthodox view failed to externalise the beginning of the law of alien status from the realm of legal logic.[43] Probably, a history portrayed as an exaggerated generalisation of precedents 'will not seem strange to those who have studied the growth of the king's prerogatives'.[44] But, certainly, it has been regarded as strange and irrelevant by other historians who do not purport to study the technicalities of legal history.

[42] About the need and possibility of the inter-disciplinary enterprise between legal history and social and political history in general, see a note by Julius Kirshner in *Storia sociale e dimensione giuridica*, ed. Paolo Grossi (Milan, 1986) p. 357. Professor Kirshner kindly provided me with this reference. I wish to thank him for his advice and warm encouragement.

[43] The mode of legal argument prevalent in case law countries has the tendency to incorporate the result of historical legal changes into the present legal argument. Thus incorporated, historical legal changes are often overshadowed by the power of judicial logic. The point was lucidly argued by Professor Maitland himself. See his inaugural lecture delivered in the University of Cambridge on 13 October 1888, 'Why the history of English law is not written' in *The collected papers of F. W. Maitland*, ed. H. A. L. Fisher, 3 vols. (Cambridge, 1911) I, p. 491.

[44] Pollock and Maitland, *The history of English law*, I, p. 463.

THE SCOPE AND AIM OF THE PRESENT WORK

Lest I should raise readers' expectations too high by the foregoing discussion of the potentials of our topic, it is necessary to state at the outset what I do and do not propose to undertake. This book is not intended to be an interdisciplinary study. Our focus is on *legal* arguments only. The lawyer's viewpoint expressed in the pages of his law book does not necessarily have an immediate impact on the way things are. Nor is it always an accurate and timely reflection of the changes in the real world. What it does, however, is to assign a particular order of priority among competing methods of legal analysis. The method of legal analysis enjoying the highest priority among members of the legal profession at a given time will become the chief means by which social relations are legally conceptualised and conflicts and problems are legally defined. The distinction between legal argument and political, scientific or other non-legal argument turns on whether a system of discourse has at its disposal the institutionalised means of coercion. Not every new proposal or argument regarding distribution of resources is translated into the language of law. Throughout the fourteenth century, for instance, Parliament repeatedly heard the vehement protest of the Commons that because foreigners were taking so many ecclesiastical benefices in England, competent English clerks were losing the opportunity for promotion.[45] However, it took more than a century before the legal profession finally accepted the urgent plea that the mechanism for allocation of ecclesiastical benefices should be changed in the interest of the king's liege-clerks. Only then was the Commons' political argument provided with the institutionalised means of coercion, and could therefore systematically alter the patterns of forcible distribution of resources among individuals (if the reform was vigorously enforced). This is what we call a legal change. And the focus of this book is exclusively on such legal changes. If we do discuss some of the non-legal works of the time, we do it mostly to emphasise the gap between lawyers' outlook and non-lawyers' outlook.

[45] *Rotuli Parliamentorum*, 6 vols. (London, 1767–77) II, pp. 141–3 ('les aliens tiegnent tantz des benefiz en vostre terre . . . et voz lieges clers suffisantz par decea le meyns avances . . .': 1343). See below, ch. 3, for further discussion.

Study of the law of alien status requires an investigation into when and how lawyers began to subscribe to a new argument which could carry out the double task of enhancing the juridical homogeneity of those deemed to be 'within' (by removing the existing legal divisions among them) and systematically discriminating against those deemed to be 'without' (by imposing legal restrictions upon their access to local resources). We have some evidence which tends to show how foreign claims to the control of English resources abruptly encountered a flat denial towards the end of the fourteenth century. This book offers a textual analysis of these late medieval legal documents. Such an effort will help bring to light a dramatic change of legal approach on whose legacy we all live now. The birth of a modern State must be sought in these mundane documents which closely record how resources were actually allocated among various contenders. The birth story should no longer remain in the highly speculative domain where only the 'contributions', 'influences', and 'implications' of some historical events or political–philosophical tracts are discussed. Neither the vehemence of political rhetoric, nor the naked power of armed forces or violent uprisings can sustain the continuous functioning of the modern State apparatus.

This book does not aim to offer a comparative study of medieval European legal development either. Apart from a few passing remarks on the situation across the Channel, all my efforts are concentrated on explaining the English experience. The pressing task, as I see it, is to release the history of the English law of alien status from the narrow historiographical confines of the military struggles between two kings separated by the Channel. Once this is done, the topic can be placed on a broader horizon of European legal development and will reveal its rich potential for those who wish to embark on a comparative study of European legal and institutional history. This book aims to do no more than prepare the ground for such comparative studies. My attempt, it is hoped, may also prove useful to those who are interested in studying the emergence and the future course of development of the modern States in Europe and beyond. It is from this standpoint that I propose to study the beginning of the English law of alien status.