ALIENS IN MEDIEVAL LAW

THE ORIGINS OF MODERN CITIZENSHIP

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ALIENS IN MEDIEVAL LAW

The Origins of Modern Citizenship

This original re-interpretation of the legal status of foreigners in medieval England boldly rejects the canonical view which has for centuries dominated the imagination of historians and laymen alike. Keechang Kim proposes a radically new understanding of the genesis of the modern legal regime and the important distinction between citizens and non-citizens. Making full use of medieval and early modern sources, Kim offers a compelling argument that the late medieval changes in legal treatment of foreigners are vital to an understanding of the shift of focus from *status* to the *State*, and that the historical foundation of the modern State system should be sought in this shift of outlook. The book contains a re-evaluation of the legal aspects of feudalism, examining, in particular, how the feudal legal arguments were transformed by the political theology of the Middle Ages to become the basis of the modern legal outlook. This innovative study will interest academics, lawyers, and students of legal history, immigration and minority issues.

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TO PETER G. STEIN, MY TEACHER

PREFACE

On what ground do we maintain a legal distinction between citizens and non-citizens? Some would regard this as a futile attempt to doubt the obvious. 'How could you *not* draw a distinction between citizens and non-citizens?' they would reply. When a concept or a categorical division has been widely and frequently used for a long period, one is tempted to think that the concept or the categorical division is somehow 'branded' in the very nature of human beings. Each and everyone would then be born with it. The division between citizens and non-citizens is perhaps one such categorical division. Even those who would firmly reject the legal distinction and discrimination based on all other criteria will have no difficulty in accepting the legal discrimination based on nationality. When a division becomes so persuasive, it becomes inescapable as well. Our imagination falls prey to this categorical division in the sense that any alternative arrangements one could possibly imagine would simply look 'unnatural' and absurd.

The present work is an attempt to study the *historical origin* of this categorical division often regarded by many as wholly natural and inescapable. Why, is there anything more to be said about the beginning of the legal distinction between citizens and aliens (non-citizens)? Do we not already know that feudalism in medieval Europe was an antithesis of the State structure? Is it not obvious that in the fragmented political and legal environment of medieval Europe, the personal legal division requiring a clear concept of the State (citizen vs. non-citizen) was unimportant and un(der)-developed? Is it not equally natural and inevitable that as feudalism gave way and the State structure was put in place, the legal distinction between citizens and non-citizens acquired greater prominence?

There is an alternative thesis which is also familiar and which

can be resorted to when one senses that the above-mentioned feudal fragmentation thesis is not going to work well. This applies to the situation in post-Conquest England, which was undoubtedly a unified kingdom with a relatively strong central government. According to this thesis – masterfully presented by Professor Maitland – it was inevitable that when foreigners from Normandy became the rulers of the English, the legal distinction between foreigners and non-foreigners had to lose significance. But when the Norman kings were driven out of their Continental homeland and had to settle permanently in England, they gradually identified themselves as English. When this happened, it was inevitable that the legal distinction between foreigners and non-foreigners became important again.

It all sounds like we are dealing here with an inevitable and inescapable categorical division which is ever ready to resurface and reclaim its preordained place in our minds. As soon as the dark clouds of feudalism and Norman Conquest were cleared away from the horizon, the legal division between citizens and non-citizens would shine again in all its splendour. If this type of explanation has enjoyed such a widespread acceptance until today, it only shows how much we are the products of our own time. In other words, what has so far been written about the beginning of the legal distinction between citizens and non-citizens is the clearest testimony of how completely we have come to believe in the inevitableness of this categorical division.

No one will doubt the historical importance of the rise of the modern State structure and the ascendance of the rhetoric of national identity. However, very little has been written about the rise of the legal regime which purports to divide human beings into the categories of nationals and non-nationals. Without exception, the beginning of the law of alien and subject (citizen) status has been summarily dealt with as nothing more than a by-product of the rise of the modern State structure. This book aims to offer a different perspective. It will be suggested that the rise of the law of alien status in the later Middle Ages cannot be treated as a mere reflection or an inevitable by-product of political or other non-legal changes of the time. It was, I shall argue, a crucial turning point in the history of Europe which ultimately led to the rise of the modern State structure. It was, as it were, the cause rather than the effect of the birth of the modern State.

What holds together all political and legal arguments which 'we' moderners would regard as characteristic of the modern era is, after all, our own outlook – how we perceive ourselves, how we define our position in society, and how we understand the purpose of our existence in this universe. By looking at some of the mundane legal texts which closely record how medieval lawyers coped with various problem situations involving foreigners, we may perhaps have a glimpse of the important shift of outlook which took place towards the end of the Middle Ages and which ultimately determined the way we now perceive ourselves, others and the rest of our universe.

Coming down onto a more practical level, one can hardly overstate the significance of the State boundary in today's law and politics. At the same time, many of us are increasingly aware of the difficulties raised by the present regime. As far as the question of the State boundary is concerned, we are living in an era of uncertainty. It is going to be increasingly difficult to be complacent about the existing arrangements. It is against this backdrop that the present work is undertaken. If no history can be written without an agenda (explicit or implicit), the need or the desire to explore the future of the nation State structure forms the underlying agenda of this study of aliens in medieval law.

Among those to whom my thanks are due, I wish to mention Professors P. G. Stein, J. H. Baker and A. W. B. Simpson in particular. My debt to these teachers is too great for words. If there is anything worthwhile in this book, it should be to their credit. The rest, of course, is mine.

It is also my pleasant duty to acknowledge the debt I owe to the following: the Posco Scholarship Foundation, Pohang, South Korea – for their generous grant which enabled me to do the research from which this book is written; the University of Chicago Law School, Chicago, USA – for allowing me to use their excellent research facilities and the Regenstein Library of the University of Chicago; the President and Fellows of Queens' College, Cambridge, United Kingdom – for offering me a Research Fellowship and travel grants which allowed me to look at some of the manuscript sources; Frank Cass, Publishers, London, United Kingdom – for allowing me to reproduce a substantial part of my article '*Calvin's Case* (1608) and the Law of Alien Status' published in 17 *Journal of Legal History*, No. 2 (1996), 155–71.

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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 . . .'