

THE LEGAL STATUS OF FOREIGNERS IN EUROPE BETWEEN MEDIEVAL AND MODERN AGES

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Resumen: En la sociedad medieval, la condición de los extranjeros a los que un señor feudal no diera su protección era exactamente igual que la de los esclavos, ya que eran considerados personas sin conexión con el señor de las tierras. La condición de los extranjeros fue variando con los cambios en el pensamiento relativos al derecho natural de las personas y a la igualdad de derechos frente a la ley.

Palabras clave: Aubain, Codificación Civil, totalitarismo, teorías raciales, Revolución Francesa.

Abstract: In the feudal organization the conditions of the foreign people, at which the lord did not guarantee his protection, was exactly the same of the slaves. They were considered aubain, namely without a personal allégeance with the lord of the lands: derived from it the so-called droit d'aubaine, referred, firstly to the feudal lord and secondly to the king, who was allowed to inherit all the properties of the not naturalized foreigners, dead in feud or in the kingdom. Their condition improved with the diffusion of new ideas like the natural equality between people, introduced by the doctrine of natural law. With the French Revolution the principle of equality attacked the legitimacy of the differences between the foreigners and the citizens and cut off every link of personal dependence. In the second half of 1800 will grow the idea of membership and the symbol of the national identity because of an expansion's logic in an international scene dominated to the terror of the war. So it's evident a significant difference to the foreigners-enemy internal and external and it becomes more difficult the freedom of circulation between countries: the previous idea of

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equality of the people yields to the racial theories and the colonialist science, typical of totalitarianism].

Key words: Aubain, French Revolution, Code Civil, Racial theories, Totalitarianism.

The legal status of foreigners² is linked with the concept of membership because of the connection between a single person and a group of people or a community. Historically it coincides with a separation rule, a definition of boundaries or - as Pietro Costa wrote - «a constitution of the *inside* and the *outside*»³. Much more the independence is strong, much more the rule of the “body” and the inclusive membership will predominate, much more the *extraneus* will strongly be the opposite of the *intraneus*⁴. In the Medieval Ages, it’s evident the importance of the independence⁵ of the “single body”, the village⁶, the feud, the kingdom where there is a very strong link with the land, the village and the feudatory. So in that context the *outside* is very clean and easy to define and it strongly and hardly the opposite of the *inside*. Taking as a reference point the laws were enacted by the lords and focus our attention on the dimension of their authority, every one born out of the kingdom were considered like an outlaw and

² GILISSEN, J., “Le Statut des étrangers à la lumière de l’histoire comparative”, in *Recueils de la société Jean Bodin*, IX, *L’étranger*, Bruxelles, 1958, pp. 5-57; ESCOBAR, R., “Rivalità e mimesi. Lo straniero interno”, in *Filosofia politica*, VI, 1, 1992, pp.79-106; D’ANDREA, D., *La soggettività moderna tra diversità e appartenenza*, in CERUTTI, F., *Identità e politica*, Roma, 1996, pp. 67ss.

³ COSTA, P., *Civitas. Storia della cittadinanza in Europa. I. Dalla civiltà comunale al Settecento*, Roma, 1999, p. 45.

⁴ KOSELLEK, R., *Per una semantica storico politica di alcuni concetti antitetici asimmetrici*, in ID., *Futuro Passato. Per una semantica dei tempi storici*, Genova, 1986, p. 181; ESPOSITO, R., *Communitas. Origine e destino della comunità*, Torino, 1998.

⁵ GROSSI, P., *Un diritto senza Stato. (La nozione di autonomia come fondamento della costituzione giuridica medievale)*, in ID., *Assolutismo Giuridico e diritto privato*, Milano, 1998, pp. 257-92.

⁶ Giovanni da Viterbo identifies the city with a space that leaves out violence: «Civitas id est citra vim habitas»: *ci* like *citra*, *vi* like *vim*, *tas* like *habitas*. DA VITERBO, G., *Liber de regimine civitatis*, edited by SALVEMINI, G., in *Scripta Anecdota Glossatorum*, Bononiae, 1901, III, p. 218.

marked by impurity-stained⁷. For this reason they could have no civil and political rights⁸, except for shrewd rules examined minutely by the legal doctrine⁹. At the beginning of the Medieval Ages, this idea of membership joined other one, the personality of the law¹⁰: according to this rule – which the Barbarians observed against the population that was under their control during the migration to the east - the subjects of the same Kingdom¹¹ could live and rule their private agreements according to different laws which derived from their own *natio*. This rule could not be applied to the non-subject (it is identified with the word *waregang* by the Ancient Germanic Population): foreign people, who lived or had stayed in the kingdom, would have any legal position, like the slaves, unless they decided to be subjected to the protection of the King and so, obtained the well-known *mundeburdium*¹² (Cf. cap. 367 of Rotari's Edict¹³). In this way,

⁷ Luigi XII used to say that in the heart of the stranger there is always fear that hides some poison.

⁸ CAPUANO, L., "Albinaggio", in *Enciclopedia Giuridica Italiana*, I, part II, Milano, 1913, p. 1076.

⁹ Cf. KIRSHNER, J., "Civitas sibi faciat civem: Bartolus of Sassoferrato's Doctrine on the making of a citizen", in *Speculum*, XLVIII, 1973, pp. 694-713; ASCHERI, M., "Lo straniero nella legislazione e nella letteratura giuridica del tre-quattrocento: un primo approccio", in *Rivista di Storia del Diritto Italiano*, LX, 1987, pp. 179-94; STORITI STORCHI, C., *Ricerche sulla condizione giuridica dello straniero in Italia dal tardo diritto comune all'età preunitaria. Aspetti civilistici*, Milano, 1989.

¹⁰ About the personality of law cf. BESTA, E., "Fonti: legislazione e scienza giuridica", in *Storia del Diritto Italiano*, Vol. I, parte II, Milano, 1925, pp. 144ss; PARADISI, B., *Storia del diritto internazionale nel medio evo*, Milano, 1940, pp. 439ss; CALASSO, F., *Medioevo nel diritto*, Milano, 1954, pp. 110ss; CORTESE, E., *Le grandi linee della storia giuridica medievale*, Roma, 2000, pp. 136ff.

¹¹ Cf. LEICHT, P.S., "Dal Regnum Langobardorum al Regnum Italiae", in *Rivista di storia del diritto italiano*, III, 1930, pp. 3 ff, now in ID., *Scritti vari*, Milano, 1943, I, p. 221ff; PEPE, G., *Il medio evo barbarico d'Italia*, Torino, 1941; AA.VV., *Atti del I congresso internazionale di studi longobardi*, Spoleto, 1952, pp. 235ff; BRUNNEN, H., *Deutsche Rechtsgeschichte*, I, Berlino, 1962, pp. 418ff; MOR, C.G., *Lo stato longobardo nel VII secolo*, now in ID., *Scritti*, Pisa, 1977, pp. 421ff; LUPOI, M., *Alle radici del mondo giuridico europeo*, Roma, 1994, pp. 232ff; BOUILLET, J., *Sacro Impero Romano - Germanico*, Ginevra, 1974; HEER, F., *Il Sacro Romano Impero: mille anni di storia d'Europa*, Roma, 1999.

¹² Word of germanic origin, probably from *mund* = *manus* (symbol of strength and protection) e *wort* = word. Cf. CALASSO, *op. cit.*, p. 112, nt. 13.

according to their choice, the foreigners would be forced to live under the Longobard laws, except for a specific permission of the King for living according to their ones.

Roth. Cap. 367. Omnes waregang qui de exteris fines in regni nostri finibus advenerint seque sub scuto potestatis nostrae subdederint, legibus nostris langobardorum vivere debeant, nisi si aliam legem ad pietatem nostram meruerint¹⁴.

The logic of the membership became complicated when the feudal organisation had come to life and had developed. In the new structure, foreigners were all the people who belonged to a kingdom from which depended a feud, but also the vassals of a feudatory compared to a feud appertained to another lord¹⁵. In both the cases, the conditions of the foreign people, at which the lord did not guarantee his protection, was exactly the same of the slaves. They were considered *aubain*¹⁶, namely without a personal *allégeance* with the

¹³ About Rotari's edict cf. TAMASSIA, G., *Le fonti dell'Editto di Rotari*, Pisa, 1889; KIER, C., *Edictus Rotari : studier vedrorende Langobardernes Nationalitet*, Aarhus, 1898; BOGNETTI, G.P., *L' editto di Rotari come espediente politico di una monarchia barbarica*, Milano, 1957; ID., *L' editto di Rotari come espediente politico di una monarchia barbarica*, Milano, 1957; BONI DE NOBILI, F., *L' editto di Rotari*, Pordenone, 1990.

¹⁴ By the critical edition of BLUHME, F., in *Mon. Germ. Hist., Leges*, vol. IV, p. 644 followed by PADELLETTI, G., *Fontes iuris italici medii aevi*, Torino, 1877, pp. 36ss. Cf. CANCIANI, P., *Collectio legum antiquarium barbarorum cum notis et glossariis*, Venezia, 1789.

¹⁵ Cf. MOR, C.G., *L'età feudale*, II, Milano, 1953, pp. 207ff; CLASSEN, P., "Fortleben und Wandel spätrömischen Urkundenwesen im frühen Mittelalter", in *Recht und Schrift im Mittelalter*, Sigmaringen, 1977, pp. 53ff; GIORDANENGO, G., *Le droit féodal dans les pays de droit écrit*, Roma 1988, pp. 112ff; TABACCO, G., *Il cosmo del medioevo come processo aperto di strutture feudali*, in ID., *Sperimentazioni del potere nell'alto medioevo*, Torino, 1993, pp.3ff; CARAVALE, M., *Ordinamenti giuridici dell'Europa Medievale*, Bologna, 1994, pp. 509ff; ASCHERI, M., *Istituzioni medievali*, Bologna, 1994, pp. 187ff; CORTESE, E., *Il diritto nella storia medievale*, II, *Il Basso medioevo*, Roma, 1995, pp. 283ff.

¹⁶ In a broader meaning *aubain* denotes the set of all legal disabilities to which foreigners are subjected, both in its ability to dispose of their property by acts of final disposition, both as regards the ability to collect inheritance. Cf. G. FUSINATO, "Albinaggio", in *Nuovo Digesto Italiano*, Torino, 1935, vol. II, parte II, p. 235.

lord of the lands: derived from it the so-called *droit d'aubaine*¹⁷, referred, firstly to the feudal lord and secondly to the king, who was allowed to inherit all the properties of the not naturalized foreigners, dead in feud or in the kingdom¹⁸.

When the modern monarchies were born, the authority of the king grew against the feudatory, so the conditions of the foreign people became better. In fact, even if the king could inherit all their fortunes¹⁹, they could perform an act: it could be summarized with the following principle: «The foreigners live in freedom and become slaves when they die»²⁰. The not-involvement in the national interest, the social and political conditions, the blind respect of the French jurists for the Crown's privilege helped to perpetuate in that time, the denial of the totality of private property rights and the political ones for the foreigners²¹ and maintain in force the principle in which *les aubains ne peuvent succéder*.

Their condition improved with the diffusion of new ideas like the natural equality between people, introduced by the doctrine of

¹⁷ Cf. BACQUET, J., *Du Droit d'aubaine*, Paris, 1664, pp. 1-97; BOULET-SAUTEL, M., "L'aubain dans la France coutumière du Moyen Âge", in *Recueils de la société Jean Bodin*, IX, *L'étranger*, cit., p. 69; DE GAMA, E., *Dissertation sur le droit d'aubaine en faveur de tous les étrangers voyageurs et qui décèdent passant dans le Royaume*, PARIS, 1708; DITHMARUS, J.C., "De jure albinagii praeipue in Germania", in *Dissertationes academicae*, diss. VIII, Lipsiae, 1737, pp. 160-184; MORPURGO, L., "Sulla condizione giuridica dei forestieri in Italia nei secoli di mezzo", in *Archivio Giuridico*, IX, p. 248-58; VOLPICELLA, L., *Del diritto d'albinaggio*, Napoli, 1848.

¹⁸ Were deemed exempt from the *droit d'aubaine* the ambassadors, the naturalized foreigners, the merchants during their stay in France and during their return to their country. The nobles foreigners were held exempt until the reign of Charles VIII. Cf. DEMANGEAT, C., *Histoire de la condition civile des étrangers en France dans l'ancien et le nouveau droit*, Paris, 1844, pp. 41ss.

¹⁹ The foreigner was prohibited the execution of any act *mortis causa*. Cf. BACQUET, *op. cit.*, cap. 27-28.

²⁰ Cf. LAURENT, F., *Le droit civil international*, Bruxelles, 1880, vol III, p. 644.

²¹ In absolut monarchies indeed the foreigner is recognized only a limited capacity resulting from the *ius gentium*, in front of the privileged status of citizen allowed to fully enjoy all civil and political rights. BARSANTI, E., "cittadinanza", in *Enciclopedia Giuridica Italiana*, vol. III, sez. II, cit., p. 608.

natural law. Those ideas found a large interest in the Science of the International Law that started with Grozio²². Following that new movement, several treaties were signed by France with other countries in the XVIII century to avoid each other the *droit d'aubaine*. Some of them abolished it, the others introduced the so-called right of allowance (or else hereditary duty) in favour of the Kingdom where the foreigners died. It consisted of a tax which had to be paid to the person who inherited fortunes in the foreign Kingdom²³. The majority part of the treaties was based on the conviction that the differences between the foreigners and the citizens of a Kingdom stopped when the two different Kingdoms become allies. In this way, the *extraneus* was not considered an «enemy», but a «friend» anymore and so they could have all the rights of each citizen. All the ideas, which were born during the French revolution, were obviously opposed the *droit d'aubaine* that was still came into force. Montesquieu²⁴ spoke about a foolish right (*droit insensé*), in which all the foreigners, who had no common treatise on the civil rights, never expected to have piety and justice.

The Revolution²⁵ cut off every link with the past thinking about the new inspirations for the new citizens (the rights, the freedom, the equality and the Nation): the principle of equality attacked the legitimacy of the differences between the foreigners and

²² DEL VECCHIO, G., *Grozio e la fondazione del diritto internazionale*, Milano, 1960; PANEBIANCO, M., *Ugo Grozio e la tradizione storica del diritto internazionale*, Napoli, 1975; ZANETTI, E., *I fondamenti del diritto naturale in U. Grozio, T. Hobbes, B. Spinoza, S. Pufendorf*, Milano, 1992; BONACOSSA, P., *Grozio fondatore del diritto naturale*, Milano, 1994; DE SANCTIS, G., *Grozio: diritto naturale e diritto civile: note introduttive al De jure belli ac pacis*, Napoli, 1994.

²³ The treaties are collected in GASHON, A., *Code diplomatique des aubain*, Paris, 1818.

²⁴ MONTESQUIEU, C. L., *Esprit des lois*, Paris, 1956, XXI, p. 17.

²⁵ BAKER, K.M., *The french revolution and the creation of modern political culture*, I, *The political Culture of the old regime*, Oxford, 1987; OZOUF, M., *La révolution française et l'idée de l'homme nouveau*, in LUKAS, C., *The french revolution*, II, Oxford, 1989; VOVELLE, M., *L'image de la révolution française*, voll. 1-4, Paris, 1990; RAO, A.M., "La rivoluzione francese e la scoperta della politica", in *Studi storici*, 36, 1, 1995, pp. 164-213; BENIGNO, F., *Specchi della rivoluzione. Conflitto e identità politica nell'Europa moderna*, Roma, 1999.

the citizens and cut off every link of personal dependence²⁶. Finally, it recognised all subjects by doing the totality of the rights and an equal condition before the law. The ancient law, according to Laboulaye, considered the foreign people as an enemy, the germanic law as a slave, the intermediate law like *aubaine* and the modern law as a man²⁷.

Following these new ideas, the French legislative assembly enacted by a decree of 6th August 1790 that all the foreigners, included the ones living abroad, had civil rights and abolished each *droit d'aubaine* and right of allowance (*le droit d'aubaine et celui de détraction sont abolis pour toujours*) accord with le droit d'aubaine est contraire aux principes de fraternité qui doivent lier tous les hommes, quels que soient leur pays et leur gouvernement; que ce droit, établi dans des temps barbares, doit être proscrit chez un peuple qui a fondé sa constitution sur les droits de l'homme et du citoyen; et que la France libre doit ouvrir son sein à tous les peuples de la terre, en les invitant à jouir, sous un gouvernement libre, des droits sacrés et inaltérables de l'humanité²⁸.

The French Constitution of 3rd September 1791, in the title I, guaranteed as a natural and civil law ... *la liberté à tout homme d'aller, de rester, de partir, sans pouvoir être arrêté ni détenu, que*

²⁶ Cf. DE BAECQUE, A., *Le choc des opinions: le débat des droits de l'homme*, in ID., SCHMALE, W., VOVELLE, M., *L'an 1 des droits de l'Homme*, Paris, 1988, p. 8; AA.VV., *L'idée de la nation et l'idée de citoyenneté en France et dans le pays de langue allemande sous la révolution*, Belfort, 1989.

²⁷ Cf. BARSANTI, *op. cit.*, p. 608.

²⁸ TULARD, J., FAYARD, J.F., FIERRO, A., *Histoire et dictionnaire de la Révolution française, 1789-1799*, Paris, 1987, pp. 412 ff. The law april 8, 1791 recognized the right of foreigners to receive and dispose by testament The same principles will be reiterated in art. 355 of the Constitution of 1795. Cfr. AA.VV., *Paroles de la révolution: les Assemblées parlementaires 1789-1794*, Paris, 1988; HUNT, L., *The National Assembly*, in BAKER, *op. cit.*, pp. 403; JAUME, L., *Il potere costituente in Francia dal 1789 a De Gaulle*, in POMBENI, P., *Potere costituente e riforme istituzionali*, Bologna, 1992, pp. 33-51; SIEYES, J. E., *Preliminari della costituzione. Riconoscimento ed esposizione ragionata dei diritti dell'uomo e del cittadino*, in ID., *Opere e testimonianze politiche*, I, *Scritti editi*, vol. I, Milano, 1993, p. 390; FIORAVANTI, M., *Appunti di storia delle costituzioni moderne. Le libertà fondamentali*, Torino, 1995, pp. 51ff.

*selon les formes déterminés par la constitution*²⁹. Along these premises, the Napoléon Code³⁰ was influenced by the national interest³¹: instead of the abstract concepts of fraternity, equality and freedom there were inside a more realistic perspective. In the section of the 24 Termodoro, the article 11 of the Napoleon Code adopted the system of the politic reciprocity: *The foreigner will enjoy the same civil rights which all the French people have from their Nation*. So the *droit d'aubaine* was re-established, unless the existence of the treaties. In addition the articles 726 and 912 established the same condition of reciprocity linked with succession *ab intestato* and the inheritance came into force³². The condition created by the Civil Code was maintained until the Duke of Levis' proposal and its subsequent approval by the law of 14th July 1819 which abolished the articles 726 and 912 of the Napoleonic Code. At the end, it made the foreign people able to receive the inheritances like all the other French citizens. The *novella legis* was much more inspired by the interest of the national prosperity in attracting rich people, capitalists and hard workers of other countries than by the principles of fraternity and equality, which were well-explicated in the preamble of the Constitution of the 1790. Otherwise the system of the reciprocity would subject the France interest to other countries one³³.

²⁹ TULARD - FAYARD, *Histoire et dictionnaire de la Revolution francaise*, cit., pp. 504ff.

³⁰ Cf. *Code Civil. Discours et fragments d'opinion de Portalis. Extrait du registre des délibérations du conseil d'E'tat, à la date et suivant l'ordre des séances dans lesquelles ils ont été prononcés*, in PORTALIS, J.E.M., *Discours, rapports et travaux inédits sur le Code Civil*, Paris, 1844; SAGNAC, P., *Le Code Civil 1804-1904, Livre du Centenaire*, Paris, 1904; A. J. ARNAUD, *Essai d'analyse du code civil français. La règle du jeu dans la paix bourgeoise*, Paris, 1973; HALPERIN, J. L., *L'impossible Code civil*, Paris, 1992; CARONI, P., *Saggi sulla storia della codificazione*, Milano, 1998.

³¹ LAURENT, *op. cit.*, III, p. 366.

³² MARCADE', V. N., *Explication theorique et pratique du code civil contenant l'analyse critique des auteurs et de la jurisprudence et un traite resume apres le commentaire de chaque titre*, Paris, 1886.

³³ LAURENT, *op. cit.*, III, p. 370. Cf. MORIN, G., *La révolte du droit contre le Code*, Paris, 1945; MARTIN, X, "L'insensibilités des rédacteurs du Code Civil à l'altruisme", in *Revue historique de droit français et étranger*, 1982, pp. 589-618.

The new conception of citizenship, derived from the transition between egalitarianism and nationalism³⁴, will form the «model»³⁵ for modifying or writing³⁶ the codes of the Unitary States: they will adopt the equality of the civil rights between citizen and foreigner. In the second half of 1800 will grow the idea of membership and the symbol of the national identity because of an expansion's logic in an international scenario dominated to the terror of the war. So it's evident a significant difference to the foreigners-enemy internal and external and it becomes more difficult the freedom of circulation between countries: the previous idea of equality of the people yields to the racial theories and the colonialist science³⁷, typical of totalitarianism. During the period of the post-war, with the born of new States and the importance assumed by the process of the decolonisation, the social and governmental transformations and the imminence of a new economical and international order, was born a new idea of foreign people, determined by an anti-totalitarian doctrine. It would be different from the totalitarian Nation-State typical of Fascism³⁸. In this way, all the «ideas of membership»³⁹, linked with the relation person-National State, changed and directed to a new international order based on the idea of a Communal Identity as well as new values of solidarity and hospitality.

³⁴ CAPPELLINI, P., *Nazionalismo*, in ORNAGHI, L., *Politica*, Milano, 1993, pp. 359-67; HOBBSBAWN, E.J., *Nazioni e nazionalismo dal 1780: programma, mito, realtà*, Torino, 1991; JENKINS, B., *Nationalism in France: class and nation since 1789*, London, 1990; SCHNAPPER, D., *La communauté des citoyens: sur l'idée moderne de nation*, Paris, 1994.

³⁵ Cf. CAPPELLINI, P., *Codici*, in FIORAVANTI, M., *Lo stato moderno in Europa*, Roma, 2002, p. 121.

³⁶ Cf. TRIFONE, P., *Dizionario politico popolare*, Roma, 1984, p. 66, nt. 47.

³⁷ LANARO, S., *Patria. Circumnavigazione di un'idea controversa*, Venezia, 1996; VIROLI, M., *Per amore della patria. Patriottismo e nazionalismo nella storia*, Roma, 1996; COSSUTTA, M., *Stato e Nazione. Un'interpretazione giuridico politica*, Milano, 1999; PORTINARO, P.P., *Stato*, Bologna, 1999;

³⁸ Cf. RUSCONI, G.E., *Se cessiamo di essere una nazione*, Bologna, 1993; DE LUNA, D. - REVELLI, M., *Fascismo Antifascismo. Le idee, le identità*, Firenze, 1995; GALLI DELLA LOGGIA, E., *La morte della patria: la crisi dell'idea di nazione tra resistenza, antifascismo e repubblica*, Roma, 1996; GENTILE, E., *La grande Italia. Ascesa e declino del mito della nazione nel ventesimo secolo*, Milano, 1997.

³⁹ COSTA, P., *Civitas, Storia della cittadinanza in Europa. 4. L'età dei totalitarismi e della democrazia*, Roma, 2001, p. 481.

The birth of the Individual Nations and the start of a different system of relation between States, in this context, led to a process of internazionalisation of the rights and fundamental human freedom, which represents the new revolutionary approach to the problem of the foreigners' legislation: foreign people like a person who, not have to suffer from any kind of discrimination compare to the citizens because all the human rights are protected from international rules and have to be granted to all the people without distinction⁴⁰. So the foreigners have finally all the rights and the freedoms necessary for living, which includes the right to live, of personal security, of individual freedom, of the recognition of the personality and the legal capacity.

⁴⁰ MORELLI, G., "Norme c.d. fondamentali e norme cogenti", in *Rivista di diritto internazionale*, 1981, pp. 508ff; LATTANZI, F., *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, Milano, 1983, pp. 1ff and 499f; CASSESE, A., *I diritti umani nel mondo contemporaneo*, Bari, 1988, pp. 213ff.