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 allegiance 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, Totalitarism.

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 intraneus⁴. 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

marked by impurity-stained\textsuperscript{7}. For this reason they could have no civil and political rights\textsuperscript{8}, except for shrewd rules examined minutely by the legal doctrine\textsuperscript{9}. At the beginning of the Medieval Ages, this idea of membership joined other one, the personality of the law\textsuperscript{10}: 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 Kingdom\textsuperscript{11} 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\textsuperscript{12} (Cf. cap. 367 of Rotari’s Edict\textsuperscript{13}). In this way,

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

\textsuperscript{8} CAPUANO, L., “Albinaggio”, in Enciclopedia Giuridica Italiana, I, part II, Milano, 1913, p. 1076.


\textsuperscript{12} Word of germanc origin, probably from mund = manus (symbol of strenght 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 externas fines in regni nostri finibus advenirent seque sub scuto poestatis nostre 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 came 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 aubain16, namely without a personal allégeance with the

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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 kingdom\(^{18}\).

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 fortunes\(^{19}\), 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 foreigners\(^{21}\) and maintain in force the principle in which *les aubains ne peuvent succéder*.

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\(^{18}\) 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.


\(^{21}\) In absolut monarchies indeed the foreignr 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 Grozio\textsuperscript{22}. Following that new movement, several treatises 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 Kingdom\textsuperscript{23}. The majority part of the treatises 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 «enemiy», 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. Montesquieu\textsuperscript{24} 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 Revolution\textsuperscript{25} 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


\textsuperscript{23} The treaties are collected in GASHON, A., Code diplomatique des aubain, Paris, 1818.

\textsuperscript{24} MONTESQUIEU, C. L., Esprit des lois, Paris, 1956, XXI, p. 17.

the citizens and cut off every link of personal dependence\textsuperscript{26}. 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 man\textsuperscript{27}.

Following these new ideas, the French legislative assembly enacted by a decree of 6\textsuperscript{th} 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 the 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’humanité\textsuperscript{28}.

The French Constitution of 3\textsuperscript{rd} 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


\textsuperscript{27} CF. BARSANTI, op. cit., p. 608.

Along these premises, the Napoléon Code was influenced by the national interest: 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 addiction the articles 726 and 912 established the same condition of reciprocity linked with succession ab intestato and the inheritance came into force. 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 one.

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29 Tulard - Fayard, Histoire et dictionnaire de la Revolution francaise, cit., pp. 504ff.
31 Laurent, op. cit., III, p. 366.
32 Marca’de, 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.
The new conception of citizenship, derived from the transition between egalitarianism and nationalism\textsuperscript{34}, will form the «model»\textsuperscript{35} for modifying or writing\textsuperscript{36} 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 science\textsuperscript{37}, typical of totalitarism. 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 Fascism\textsuperscript{38}. In this way, all the «ideas of membership»\textsuperscript{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.

\textsuperscript{36} Cf. TRIFONE, P., \textit{Dizionario politico popolare}, Roma, 1984, p. 66, nt. 47.
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 distinction. 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.