

## COMMENT

● *In the last decade our work in the Faculty of Law at Sydney has been enriched by an increasing interchange, both direct and through continental legal journals, with the juristic thinkers of Italy and of many other countries in Europe, America and Asia. A number of us have enjoyed the hospitality of the pages of the *Rivista Internazionale di Filosofia del Diritto* and of the *Archiv für Rechts- und Sozialphilosophie*. The latter journal has recently produced a special supplement wholly devoted to Australian contributions.*

*In what we hope may be an apt response to this generous hospitality, we are honoured to publish a learned note by the distinguished Italian legal philosopher Giorgio Del Vecchio on the evolution of the principle of hospitality to foreigners.*

### THE EVOLUTION OF HOSPITALITY

#### A NOTE ON THE HISTORY OF THE TREATMENT OF FOREIGNERS

It is a well-known fact that the practice of hospitality to foreigners was generally observed by ancient peoples. This same fact leaves no doubt of the intrinsic connection of such a practice with the less advanced forms of social life. In our times it may be found practised in a like manner in places where civil institutions have not reached the highest point of progress, and within a nation it is often to be found in country regions, whereas in towns it is much more rare.

How can this be explained; and how can it be reconciled with the fact that relations and agreements between the various peoples naturally tend to increase with the enlightenment of their consciences and with civil progress? A careful study of the question will give a solution to this apparent contradiction.

The institution of hospitality to foreigners cannot be explained except as a function of the condition or status of foreigners themselves in primitive times; and this condition or status in its turn can only be rightly understood if the principles which inform primordial societies are examined.

The primitive link which binds men in living together is the relationship of parentage, and common blood. This link not only determines ethnic formations; it also affords the regulating principle for behaviour. This is summarized in the *solidarity* of the component members of the group. Only in as much as he belongs to a racial group does the individual have any rights and obligations, for these do not exist except in relation to the other members of the same group. The foreigner was originally, as he still is today in those countries which have not yet outgrown the early stages of their development, completely deprived of any legally recognised status whatsoever. His intrusion into the civil and political life of the community would then have more or less the same significance that in our society is given to the entrance of a foreigner into the life of a family.

The recognition of the civil capacity of the foreigner supposes, as pointed out by Jhering,<sup>1</sup> a clear cut separation of private from public rights. But in primitive society these two branches are confused in principle and the law is conceived as valid only for those belonging to the same group, so that it is only to them that its protective efficiency is extended.

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<sup>1</sup> See R. von Jhering, *1 Geist des Römischen Rechts* (5 ed., 1891) § 16, at 226.

As a consequence, to be exiled was regarded in ancient times as one of the most severe punishments. If anyone, having committed serious crimes, was expelled from the group to which he belonged, it meant that he completely lost all his rights, and that anyone could kill him and get off scot-free. The declaration of alienage originally coincides in effect with the death sentence;<sup>2</sup> and even in times of a more developed social life criminals are sometimes allowed to leave their homeland, thus putting a definite stop to the penal proceedings against them.

On the other hand, a true right of emigration is not to be found except among peoples who have reached a high degree of civilization. Voluntary emigration was considered in principle as a violation by the individual of his obligations to the community; which consequently defended itself against such a weakening of itself, either by absolute prohibition thereof, or by setting up obstacles of different kinds, especially those regarding the property of persons wishing to emigrate. It was only in times not long distant from ours that specific emigration taxes were abolished (*detractus personalis, gabella emigrationis*; German *Abschoss, Abzugsgeld*), and in the majority of modern States the only trace of that primitive bond now to be found is national military service.

When a man left his original group, whether through expulsion and outlawry or for any other reason, he immediately lost by this action all possibility of receiving any help or maintenance. As a result of his departure he was considered to have withdrawn from the obligations which primitive solidarity imposed on him regarding his fellow-men; and they in their turn, even when material difficulties did not stand in the way, were exonerated from any reciprocal obligations to him.

Thus everywhere a stranger found himself deprived of any legal protection. He was no longer a person and his condition was considered as that of a stray animal.<sup>3</sup>

The stranger's economic condition was also extremely unenviable. Even though the infliction of the above-mentioned measures may not have involved despoiling him of his wealth, on leaving his homeland he carried away with him a virtually absolute impossibility of gain, either due to the low value of movable property in the days of little industrial activity, or due to the very great difficulty presented by transportation. Added to this, and due to his inferior social position, were the very great obstacles to fruitful exercise of his own abilities in a foreign land. Thus everything concurred to make the wanderer's condition untenable, even economically, after he was thrown on the mercy of fate, completely devoid of rights or means of maintenance.

As a consequence and in confirmation of this, it may be noted that whereas primitive history records numerous and remarkable collective migrations—effected either spontaneously by populations wishing to improve their living centre, or because they had been driven out by force—cases of individual emigration in ancient times were extremely rare, and they cannot be said to have become a true historical category until later and more highly civilized ages.

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<sup>2</sup> See N. Tamassia, "Dell'ospitalità" (1896) 22 *Rivista Italiana per le Scienze Giuridiche* 369; P. Wilutzky, 3 *Vorgeschichte des Rechts* (1903) 115. See also the works of Post cited *infra* n. 10.

<sup>3</sup> This concept was developed by Jhering in his essay "Die Gastfreundschaft im Alterthum" in (1887) *Deutsche Rundschau*, Heft 9, in which primitive hospitality is examined in a very ingenious (though rather onesided) manner. The examination gives the author an opportunity to set forth his principles of legal philosophy, already dealt with in the work *Der Zweck im Recht* (1877-1883). We shall omit here any criticism regarding those principles in order to keep strictly to the subject of this essay.

The primitive concurrence (even verbally: *xénos*, *hostis*, *gasts*, etc.) of the ideas of "stranger" and "enemy" is well known, but it must not be taken to import a savage hate for every stranger. Such a theory would be purely fantastic, having no historical or psychological justification, and many facts (some of which we shall mention later on) contradict it explicitly. The significance of that coincidence is only what follows from the factors already referred to, namely, that the stranger cannot count for his own defence on anything but force or divine assistance, since he is outlawed precisely because he is outside of his own community. In the beginning there was undoubtedly very great diffidence in dealing with strangers, who automatically came under great suspicion by the mere fact that they had left their own native group, and could, upon returning to it, help it considerably by means of their reports in carrying out attacks or raids. However, there is no historical proof that there ever was a period when the individual was truly *homini lupus*, and one cannot certainly accept as sufficient the mythical references mentioned by Jhering in his work cited above. War was most probably the first means whereby men, as a race, first met each other; but from this very relationship peaceful relations could not but be born (as history shows), either due to specific events of war or to the final effects of conquest.

In the case of the lone wanderer or pilgrim, the man from distant lands, ignorant of his surroundings, weak and lacking everything, there could be no possibility of his wishing to do harm, because only at the mercy of others and with their help could he expect to survive. His very state of helplessness must have inspired in the primitive soul a feeling of pity, or at least tempered the ferocity of those who meant to harm him. Neither could national animosity be directed at him, since an individual who had left his own people had lost all political significance: the *exgens* was *only* a physical person. By harming him, therefore, no profit would be gained either personally or for the homeland, and to attack an undefended person was already considered in ancient times as an act of cowardice.

But in truth, given the above mentioned conditions, to deny shelter to a stranger and abandon him to himself would have been more than a simple lack of courtesy; it would have been an act of positive cruelty. For, there being no support from any public institution, life in a foreign country without the benefit of private hospitality would have been well nigh impossible.

Thence can be explained the source and the practice of that principle which we are able to see as having been almost universally applied by primitive peoples and which Tacitus expresses in the well-known words *Quemcumque mortalium acere tecto nefas habetur*: it is wrong to deny shelter to any human being. A stranger is sacred and the gods desire that he should be protected. The Greeks from the time of Homer attribute to Jove himself his protection; and their *Zeus xénios* becomes the *Jupiter hospitalis* of the Romans.<sup>4</sup> Several myths appear to confirm this religious idea.<sup>5</sup> And in our own religious heritage,

<sup>4</sup> Cf. *The Odyssey*, VI, 207-8; IX, 175-6 and 266 *et seq.*; *The Aeneid*, I, 731.

<sup>5</sup> See especially for Greece: Ernst Curtius, *Die Gastfreundschaft* (1870); L. Schmidt, *Die Ethik der alten Griechen* (1882) Ch. V; E. Catellani, "Il diritto internazionale privato nell'antica Grecia" in (1892) *Studi e Documenti di storia e diritto*, Fasc. III; A. Levi, "Gli accattoni nei poemi omerici" in (1902-1903) *Atti del R. Istituto Veneto di scienze, lettere ed arti*, T. LXII, P. II. On the ancient Germans, we may note the testimony of Caesar: "Hospitem violare fas non putant" *Commentarii de bello gallico*, L. VI, C. 23, as well as what is reported by Tacitus, *Germania*, C. 21. See, for analogous observations on various peoples: F. Laurent, *1 Etudes sur l'histoire de l'humanité* (2 ed. 1861) 59-61, 2 *id.* 117-119, 3 *id.* 67-76; E. Westermarck, *1 The Origin and Development of the Moral Ideas* (1906) 570-596; G. Richard, *L'évolution des mœurs* (1925) 165-182. The partial exceptions which are also pointed out by some of the older writers (for example, G. B. Vico) do not detract from the fact that the rule of hospitality, practised equally in the great majority of cases by the most diverse peoples, was of general significance.

closely following the giving of the Judaic Ten Commandments, we find in Exodus 23.9: "Also thou shalt not oppress a stranger".

But to understand the origin of this principle fully, one must examine the matter also from another viewpoint. Not only pity was aroused in the primitive soul at the sight of a stranger, but also curiosity. His fashion of dress and his racial characteristics must have drawn a great deal of attention upon him. A description of his homeland, and the narration of his adventures and of the dangers he had encountered, offered his hosts a certain pleasure, especially in those days when the opportunities of hearing news from other countries were very rare. This in itself almost became compensation for services rendered, whilst it helped to create that atmosphere of *sancititas* which often enveloped the figure of the wanderer.

All the fantastic and religious motives of the primitive soul must have been put into action upon the appearance of a new being, of another race, coming from unknown lands. The idea that under the pilgrim's garb a divinity might be hidden (a widespread belief, as may be seen from the poems of Homer and Hesiod, Buddhist scriptures and the Bible itself)<sup>6</sup> was a very effective stimulant to the observance of hospitality. Especially if the arrival of the stranger coincided with some remarkable historical or meteorological event, or if he belonged to a more advanced race, then superstitious opinions regarding him and his powers were very easily formed. This explains the phenomenon, widespread even today among savage peoples, of the deification of strangers.<sup>7</sup>

Undoubtedly what made possible the institution of hospitality in this form, of a spontaneous act as a religious duty, was the scarcity of strangers. But their number began to increase due to the experience of the usefulness that relationship with them brought. The periods of fighting and complete isolation of groups tended to become exceptional, whereas industry developed and the opportunity for trading became apparent. The fantastical ideas which kept primitive men from a general massacre of strangers and which even led them to a superstitious worship of them, were supplemented and largely supplanted by a new motive to respect such visitors and to favour their arrival: the need of exchange.

Then it was that primitive hospitality—unsure in its nature, not sufficient to remove the stranger from his basic condition of want or from the dangers of his condition, and far from sufficient to give him an adequate guarantee of security in his affairs—had to undergo a deep modification to adapt itself to its greater function.

And its gradual development is revealed by facts. The gifts by which the guest showed his gratitude assumed an ever increasing and definite function, and tended to become a compensation. More general and characteristic was the fact that agreements were made between particular individuals and families to establish a reciprocal obligation of hospitable aid;<sup>8</sup> and such a bond was usually hereditary. To this kind of contract (known among the Greeks as *symbolon* and among the Romans as *tabula* or *tessera hospitalis*) there was naturally attributed the same religious significance as had been previously given to the relationship of hospitality. But in fact at this stage the institution had already changed its character: hospitality had become a business and the superimposition of the legal and commercial elements over that of pure

<sup>6</sup> Cf. Hebrews 13. 2: "Be not forgetful to entertain strangers: for thereby some have entertained angels unawares." On the ancient belief "in the journeys of the gods in human form" see F. M. Pagano, 2 *Saggi politici* (1785), Saggio IV, C. XIX.

<sup>7</sup> Examples of this are given by Herbert Spencer, 1 *Principles of Sociology* (1876) § 199, pp. 425ff.

<sup>8</sup> It is because of this reciprocal commitment that the word *hospes* is applied equally to the host and the guest. See B. W. Leist, *Alt-arisches Jus Civile*, I Abth. (1892) 364.

sentiment is clearly demonstrated by the use of the *tessera* itself, which served as a means of identification and made legal representation a possibility.<sup>9</sup>

The principle by which a foreigner, as such, was excluded from any communal rights with the citizens, and by which all legal protection was denied to him, had to be at least mitigated, by the strict necessity of commerce itself. The original form of such mitigation is found in the fact that by hospitality a relationship similar to adoption was established.<sup>10</sup> The stranger is protected by his host, who is responsible for his actions and pleads his legal rights as if they were his own. The bilateral character which became more marked as time went on, whereby the host is compensated by the guest (whether by the prospect of an exchange or by immediate services rendered), gave economic content to the loyalty of the relationship. Nevertheless the foreigner was still always at the mercy of his host and no law protected his status.

A more effective form of protection was given by the institution of *próxenos*. This is worthy of note because it shows us the State itself seeing to it that its citizens are not left without protection when abroad. For the reason mentioned above (namely, the exclusiveness of civil rights) there was elected from among the citizens of the foreign country a representative with the specific function of upholding in judgment those belonging to the State he represented and of helping them during their stay. As remuneration for these services he received no small privileges and the office itself was considered as an honour. This was in fact the primitive form of consulship.

Similar in certain aspects, though risen from another historical foundation, was the Roman institution of patronage, which also, and indeed predominantly, included legal representation, and may be considered as a special form of hospitality (*hospitium*).

However, even with these institutions the foreigner was still under his original legal incapacity. Only through the offices of some citizen could he claim any rights, and though religious customs and ideas exercised a certain influence, which at times was not without legal reflections, nevertheless, as time went on and the number of relationships increased, such a fictitious procedure could not but show itself insufficient to the requirements of living. And this, finally, made the citizens themselves consider opportune an official—that is, public—legal recognition of foreigners; though even then this recognition was only partial.

This step was of great importance in the evolution of the law, and corresponds to another more general and more complex fact: the consolidation of the power of the State over the familial communities. As the protection of

<sup>9</sup> See C. Ph. Tomasinus, *De tesseris hospitalitatis* (1670). It appears that this institution can be credited to the Phoenicians who, as merchants par excellence, gave a greater development to the juridical organisation of hospitality. Such is the conjecture of Jhering; and W. M. Wundt, *Ethik* (2 ed. 1892) 233 n., has also given recognition to the matter. However, in my opinion, Jhering's theory that a commercial juridical organisation was the first form of hospitality ("*Die Gastfreundschaft*", cited *supra* n. 3, at 374 *et seq.*; "*Die Gastfreundschaft . . . ist nichts als der nackte Egoismus*" (at 380)) is untenable. The material interest in establishing business relations with foreigners would be, according to Jhering, the original reason to treat them well. They were spared because they were needed (at 379). But such a construction contradicts all the data which can give us light on the matter. The original respect for a foreigner was not due to mere calculated interest, but to sentimental and fantastic reasons to which was only added at a later time the perception of business advantage. So much so, that hospitality can be found where there is not even a shade of trade relationship with the foreigners. The reasons of trade only appear to give a concrete form and to develop the roots of the institution.

<sup>10</sup> Cf. A. H. Post, *Die Geschlechtsgenossenschaft der Urzeit* (1875) 107; *id.*, *Der Ursprung des Rechts* (1876) 43-45; *id.*, *Die Grundlagen des Rechts und die Grundzüge seiner Entwicklungsgeschichte* (1884) 179; *id.*, *Grundriss der ethnologischen Jurisprudenz* (1894-1895), I Bd., §§ 43, 132, II Bd., § 16; F. Ciccaglione, *Dell'asilo, della clientela e dell'ospitalità* (1889); C. Calisse, 3 *Storia del diritto italiano* (1891) 22; N. Tamassia, *op. cit. supra* n. 2, 375; H. V. Frisch, *Das Fremdenrecht* (1910).

citizens was no longer left to primitive solidarity, but was taken over by the political authority of the State, so too, in answer to the same historical needs, that authority began to assume the protection of foreigners, who naturally tended to shelter under its wing. Public hospitality was thus substituted for that of a private nature.

At first this was also brought about by means of special agreements and concessions. As it had been between individuals and families, so now the *foedus hospitii* was agreed between States; and the *hospitium publice datum* of the Romans is nothing but a legal protection, more or less extensive, publicly granted to citizens of another nation.<sup>11</sup> The Greeks give us notable examples, though extraordinary ones, of civil parification (*isopoliteia*). To be noted on another side is the establishment of a judiciary institution in Rome, independently of agreements, which by its continuity of function exercised a great and efficient power on the progress of Roman Law generally: the *praetor peregrinus*, through whom it may well be said that the development of private international law had its start in Rome.

The foreigner was no longer a stray animal, no longer just a physical person. The juridical existence of man had started to become independent of his residing in his native land. This is a point well worth noting.

The juridical condition of foreigners was, however, for a very long time one of great uncertainty and subject to all kinds of disfavours. Thus, in Rome, they were excluded from the *jus civile*, and only in extraordinary cases or by special concession could they obtain the *commercium*. Among the Germans the same protection (*mundium*) from the king, granted to foreigners as well as to all those in need of help, placed them in a dependent position, expressed by a series of taxes mostly on property. Of this protection, therefore, a specific *regalia* was created and then transferred, as were all others, to the various feudal lords. The *jus albinagii* (from *alibi natus*) mainly comprehended the rights to inheritance of foreigners' goods, due to their testamentary incapacity, which was established for the precise purpose of appropriating their goods. Only later was this law, reduced in parts here and there, converted into a simple tax.

Slowly, mainly due to reciprocal concessions between various States in the form of treaties and otherwise, and in accordance with the requirements of the wider and more peaceful international communications which these had brought about, the foreigners' status began to improve. Naturally, civilization and trade gradually filled up the abyss which separated peoples from each other, and institutions and ideas became modified in the general manner previously indicated. One can, therefore, say that the quality of *peregrinitas* faded in the foreigner, taking with it all the real and psychic residue of its primitive significance, to give place to an ever clearer and less prejudiced estimation of his *humanitas*. And the idea of man was by then firmly associated with the idea of legal rights.

The progressive legal equalisation of the foreigner with the citizen, though very slow in its effect and subject to historic vicissitudes, is one of the most sure and remarkable traits of social evolution. Already in our time in the greater part of private law the *status civitatis* is, in the more developed systems, a historical category almost worn out.<sup>12</sup>

<sup>11</sup> See Theodor Mommsen, "Das römische Gastrecht" in *Römische Forschungen*, I Bd., 1864, 326-354.

<sup>12</sup> In this regard Italian legislation is among the most liberal and has shown true progress, having established as early as in the Code of 1865, the principle of equality in civil rights. According to Art. 3 of that Civil Code (which must, however, be compared with Art. 6 of the preliminary Title on the laws in general) "the alien is admitted to enjoy the civil rights granted to citizens". Hereby homage was paid to "the trend of modern times, which invoke to a high degree the principle of solidarity among the human family" (Vacca report), it having been considered (Pisanelli report) that the differences

Together with this, a similar evolution gradually took place in the field of economics, by which the conditions of the foreigner were assimilated to those of the citizen. The prevalence of personal property over real estate, the ever increasing accommodations and speediness in monetary matters, the increase in extent and facility of exchange and banking operations, little by little made the disadvantages of being far from home much less noticeable, while the legal and moral possibility—accepted in continuously greater measure—of exercising one's own industry profitably in a foreign country, made man, even economically, freer in his choice of residence. In our times emigration no longer involves, as it once did, the loss of property or of the enjoyment of all or part of one's holdings; and accordingly the want in which an alien might find himself is no longer generally due to his status as such.

This explains the disappearance of those primitive ways of treating a foreigner which, as we have seen, presuppose his total exclusion from the ordinary society of the citizens. As it becomes possible for the alien to take part in the moral and civil life of the nation in which he has taken abode, and this becomes so more extensively all the time, his private protection becomes less necessary, and thus primitive hospitality loses its specific function. The need for a treatment *sui generis* becomes less, and relationship with aliens comes progressively under the general laws which preside over human relations.

Thus the principle of equality asserts itself step by step according to the needs of civilization. And thus we may hope that the continual development of international private and public law will bring the human destiny steadily closer to the point where all mankind can be considered under one sole principle in a universal régime of freedom.

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still in force in the civil rights between citizens and aliens could be brought to an end without danger. The new Civil Code (of 1942) has, however, imposed the condition of reciprocity (Art. 16 of the preliminary Dispositions on the law in general).

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