

RIGHTS OF STATUS IN MODERN LAW.

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According to a famous dictum of Maine, society in its legal evolution has been moving from status to contract. It would be impossible to maintain that this generalization holds good for our age; I should like to give certain reasons to justify this qualification.¹

To begin with, let us notice the peculiarity of the conception of *status*. It is applied, not to a homogeneous set of rights and duties, but to a heterogeneous complex of rights and duties held together by some personal attribute. The status of a slave, of a freedman, of a priest, of a husband is thought of as a combination of various personal qualities and liabilities. For this reason rights of status emerge, as it were, outside the received classification of rights. One cannot say that the status of a priest is either a *jus in rem* or a *jus in personam*; various real and personal rights may be derived from it or be connected with it, but it is not thought of primarily as established against "all the world" or in regard to one or the other person. It is a social position dependent on the performance of certain social functions. The status of a husband or of a wife, though sounding in contract in certain respects is certainly not a contract in its essence, and its legal treatment is affected in every way by the recognition of the fact that marriage is the basis of the family, and insofar a most important element of social life. It seems almost as if one more variety should be added to the usual classification: by the side of rights against the world and rights against certain persons we ought to register rights against the social organization.

¹Dean Roscoe Pound, in his recent book, *Interpretations of Legal History*, p. 51, criticises Maine's generalization from a different point of view and with different results.

This means that *status* has to be considered fundamentally as a conception of public law, whatever consequences may be attached to it in private law. History fully justifies this analytical conclusion. As Maine has pointed out, there was a long period of cultural development in which status exercised a potent influence on the structure of law, and we may add that this influence is clearly connected with the public character of the relations of *status* in the ancient and the mediæval world. The Roman *paterfamilias* was a ruler in fact and in law over his wife and children, his son was a person *alieni juris*, the legitimate wife was, as a rule, subjected to *manus*, the spinster to parental authority or agnatic tutelage. It is hardly necessary to insist on the public character of slavery or of manumission. Turning to mediæval society we find it differentiated in the various "estates":² each of these appears as a definite social group endowed with political privileges and functions. Kings have to reckon with this fact when they want to exert national action—they have to appeal for support to the estates—barons, knights, townsmen, clergy, merchants, judges—which are recognized as public forces.

The movement which characterizes modern history from the XVI. century to the XIX., and which found its greatest manifestation in the French Revolution of 1789, was directed towards individualism. Society was re-organized on the basis of free agreement between its members. Contract became the principal form of co-operation and all social relations were considered as mobile groupings between free individuals of equal standing. This is the social process which Maine had in view when he wrote down his *dictum*, and undoubtedly he had good reason for such a formulation. Not to speak of the disappearance of the status of subjection in the shape of slavery or serfdom in their various grades and of the almost universal abolition of privileges connected with "noble" birth, the tendency

² The German *Stand* means primarily "condition," hence "class."

of this cultural period was directed towards breaking up semi-public combines "in restraint of trade" in the shape of guilds and crafts, and towards loosening the discipline of family organization. This process is very conspicuous in French law.⁸ The *Code Civil* introduced contract into the legal relation of marriage, and made it the basis of property relations between husband and wife, but kept up a privileged position for the husband as regards the management of the household and the discipline of the family. Art. 213 of the *Code Civil* declares that the husband owes protection to his wife, while the wife owes obedience to her husband. The administration of their common fortune is submitted in various degrees to the control and direction of the husband: the wife cannot dispose of it or assume obligations without his consent. Some recent laws have modified this régime of incapacity by certain admissions of the independent right of married women. Her savings deposited in a savings bank are protected against arbitrary appropriation by the chief of the household (Law of April 5th, 1881). A salary earned by a married woman cannot be seized by the husband (Law of July 13th, 1907). But the gradual movement of emancipation is far from complete even now. In fact the whole of the so-called feminist movement may be traced to a reaction against inequalities in the political and juridical status of men and women. This development is governed by the idea of equity in the treatment of individual members of society.

These results are substantially modified by the necessity of compromises with ideas of public utility and moral obligation acting, as it were, at right angles to the tendency towards equality of rights as between the members of a community.

There are, in fact, strong currents in modern social evolution which bring about legal situations that cannot in any way be subordinated to notions of free agreement and call for a revision of the view that the

⁸ See Charmont, *Les transformations du droit civil*, pp. 93 ff.

law of *status* has ceded its place to voluntary agreements. A leading German writer, the late Professor Jellinek, has constructed a theory of modern public law in which rights of status play a conspicuous part.⁴ In analysing the theory of the legal state (*Rechtsstaat*)—an expression which might be interpreted in English by “rule of law”—he came to the conclusion that, although the powers of the State cannot be derived from a concession by individual members of their natural rights for the sake of obtaining protection and guarantees for the rest of these rights, the State is limited in the exercise of its powers by the recognition of juridical relations with citizens on the basis of their status. In other words *status*, according to Jellinek is the public law standing of individuals in accordance with certain juridical grades. He distinguishes four grades of this kind—the status of subjection, the status of freedom, the status of citizenship and the status of active or enhanced citizenship. The lowest of these grades would be formed by slaves, serfs and the like—a group which has disappeared from the law of modern civilized communities. The second group embraces all persons to whom personal freedom is guaranteed; it comprises the negative qualification of freedom—freedom from personal injury and imprisonment, from compulsion as to creed or opinion, from impediments as to settlement, travel, trade, etc. Citizenship is more difficult to formulate: it concerns, according to Jellinek, right of juridical action (*Rechtsschutz*), and consideration of interests. The last item is not clearly characterized from a juridical point of view, but the author connects them with the administrative activity of the State in providing for public health, public order, public education, etc. Lastly comes the group that covers active citizenship as expressed in electoral franchise, the standing of deputies in national and local assemblies, the status of officials and heads of States. I am recalling these

⁴G. Jellinek. *System der subjectiven öffentlichen Rechte*. Freiburg i. B. 1892.

positions of Jellinek because they present the most explicit treatment of Status in modern literature of public law. But, as sometimes happens in the case of theoretical works, the construction is too much governed by abstract concepts, although there is plenty of concrete material which could have been used in the course of the inquiry.

Some of the abstract definitions of Jellinek's scale can be easily criticized. There is no other reason for severing rights of free status from rights of citizenship than the fact that the first are wider than the second—they do not apply to different groups, but can be claimed by the same persons—and therefore if treated as rights of status they ought to be combined in one and the same class. Why should the right to bring an action as to property or reputation be separated from the right to defend one's freedom of intercourse? One set of rights may be defended by rules as to expropriation,⁵ another by rules as to *habeas corpus* and the like. The right to bring an action before the regularly constituted courts⁶ is quite as much a fundamental right of the free Englishman or American as his right to petition for the dress of grievances.⁷

In such cases the reference to the status of free man or citizen may, of course, be used rightly, but it would be used in a different sense from that in which it applies to the special position of a group or order of society. In all these respects there is no room for the legal differentiation on a social basis which formed the characteristic feature of status in predemocratic society. Such differences as still exist are dwindling and exceptional. All the rules just mentioned appertain to general public law and may be described as regulating the relations between the State and normal individuals. Their "negative" character is only apparent when we look at them from the point of view of restrictions

⁵ See Leslie Scott and Hildersley, *The right of requisition*, pp. 17 ff.

⁶ *Chester v. Bateson*, L. R. (1920), K. B. D., January 29.

⁷ See Dicey, *Introduction to the Law of the Constitution* (8th ed.), p. 480 ff.

imposed by law on the State, while they have a corresponding positive side in the competent, though limited authority of the State and the duty of individual citizens to submit to it. The right to arrest under warrant and to verify the legality of the arrest by judicial authority is the positive counterpart of the right to *habeas corpus*. The right to expropriate is not abolished but affirmed by the rule as to equitable compensation. The subtle distinctions between protection of interests and "consideration of interests" established by Jellinek under the heading of "civic" rights, may be set aside without further discussion: they belong in truth to the administrative department of public welfare and not to the juridical domain as such.

On the other hand within the class styled by Jellinek as "rights of active citizenship" there are undoubtedly certain situations which bear the mark of *status* in the original acceptance of the term. In the case of members of the electorate as contrasted with the bulk of ordinary citizens the connotation is not of particular importance, as the one attribute of the elector—his right to cast a political vote—does not constitute a permanent and many-sided privilege. It amounts in practice to the *exercise* of a political function on rare occasions. But the case is different as regards permanent public functionaries of various kinds: soldiers, sailors, public teachers, civil service clerks, judges, members of Parliament possess certain qualifications and are subjected to many requirements which are very different from those of other citizens and constitute for them a special *standing* or *status* within the community. Sometimes it is not easy to disentangle their professional rights and duties from the rights and duties guaranteed to them as members of a commonwealth under Common Law. This has to be achieved by process of law in order to ensure proper juridical protection as well as the maintenance and efficiency of public services. Theoretically the representatives of public power, while they are holding it, may enjoy a personal

protection, a liberty of action, a freedom of speech, which are beyond the reach of their contemporaries, while at the same time they have to submit to a discipline and a responsibility for their conduct which cannot be measured by ordinary standards of obedience or liability. Nevertheless this disciplinary power must not be exercised in an arbitrary and oppressive way, and the private soldier, for example who deems himself aggrieved may bring an action before an ordinary court and provoke a searching examination of the acts of his superior officer by the judge.

In modern French law the situation arising from the attribution of functions for the purpose of a "public service" has been the subject of an especially close investigation by the *Conseil d'État*. I will merely cite one leading case—*Rosier et Winkel*. Two employees of the Posts had taken part in a general strike against the administration and were eventually dismissed. They sued the Minister of Posts and Telegraphs on the ground that the law of April 22nd, 1905, had been infringed by him and their rights violated^s inasmuch as they had not been informed before dismissal of the threatening penalty, and were deprived of the right under sec. 65 of the above mentioned law to present explanations and to justify their conduct. The *Conseil d'État* rejected their demand that the ministerial decree should be annulled, on the ground that they had forfeited the privileges of the status conferred on employees by the law when they threw over their duties and jeopardized the performance of the public service from which their privileged status was derived. The *Conseil d'État* held among other things that the contract between the State and its functionaries cannot be assimilated to a private law convention, but constitutes a special form of juridical relation, which may

^s S. 65: Tous fonctionnaires employés ou ouvriers de toutes les administrations publiques ont droit à la communication personnelle et confidentielle de toutes les notes, feuilles signalétiques et tout autres documents composant leur dossier, soit avant d'être l'objet d'une mesure disciplinaire ou d'un déplacement d'office, soit avant d'être retardés dans leur avancement à l'ancienneté.

be termed a contract of public law. Its essence is the maintenance of a continuous and efficient public service,⁹ and its clauses are settled in a one-sided manner by the State. Functionaries who imperil or obstruct the performance of the public function entrusted to them renounce *ipso facto* the privileges and guarantees conferred on them by their statute.¹⁰

A similar situation arose in England in connection with the strike of policemen in 1910. It does not require much imagination to realize to what extent the granting of a guaranteed status to a group of functionaries or employees presents itself as a double-edged expedient. On one hand it is intended to prevent high-handed treatment of subordinates by superiors, on the other hand it binds the employee to a juridical relation which is not really dependent on contract, but crystallises into a status, a condition intended to be durable and undisturbed for the sake of the important public service attached to it. When the official has entered into this kind of relation with the State he is deprived of the freedom of movement which he would

⁹ *Rosier et Winkel*, Aug. 7, 1909: Dalloz, 1911, 3.17. La grève est un fait qui, par lui-même, produit des effets juridiques et notamment rompt les liens qui unissent le fonctionnaire à l'état. La continuité est de l'essence du service public. Entre l'état et ses agents, qu'il appelle à collaborer aux divers services publics, intervient ce que M. Laferrière appelle un contrat de droit public Considérant que la grève, si elle est un fait pouvant se produire légalement au cours de l'exécution d'un contrat de travail réglé par les dispositions du droit privé, est, au contraire, lorsque elle résulte d'un refus de service concerté entre des fonctionnaires, un acte illicite, alors même qu'il ne pourrait être réprimé par l'application de la loi pénale; que par son acceptation de l'emploi qui lui a été conféré le fonctionnaire s'est soumis à toutes les obligations dérivant des nécessités même du service public et a renoncé à toutes facultés incompatibles avec une continuité essentielle à la vie nationale; qu'en se mettant en grève, les agents préposés au service public, sous quelque dénomination que soit, ne commettent pas seulement une faute individuelle, mais qu'ils se placent eux-mêmes, par un acte collectif, en dehors de l'application des lois et règlements édictés dans le but de garantir l'exercice des droits résultant pour chacun d'eux du contrat de droit public qui les lie à l'Administration; que, dans le cas d'abandon collectif ou concerté du service public, l'Administration est tenue de prendre des mesures d'urgence et de procéder à des remplacements immédiats La requête est rejetée.

¹⁰ Cf. *Duguît, Traité de droit constitutionnel*, I. 435 ff.

have enjoyed under a contractual regime. He is deprived especially of one of the fundamental rights of contractual service—of the right to strike. After the collapse of the postal and of the railway strikes in France (in 1905 and 1909) attempts were made to work out a complete and minute legislative enactment on the subject of the status of functionaries. The plan prepared under Clemenceau's Ministry, by M. Maginot, did not reach the stage of approval by the legislature. The principle of *status* is, however, recognized and maintained by a number of previous acts and decrees, and may be regarded as holding the field in French administrative law.

In England a remarkable, though exceptional, case arose during the war when the Munition Factories Acts were passed in 1915, 1916 and 1917. As Mr. Asquith said at the start, the idea was to substitute a régime of public law contract for one of private contract in respect of fabrication of munitions. By this public law régime strikes and lockouts were definitely prohibited, trade-union rules set aside in most important matters, the workmen subjected to strict supervision and a discipline similar to that of military organizations, and the whole machinery put under the control of compulsory arbitrators and judges. The idea of national service that inspired this legislation proved to be thoroughly effective and found patriotic support from the employers and employees. The measures referred to lapsed with the conclusion of the war, but the idea represented by them deserves careful attention and is sure to assert itself again in circumstances of difficulty and danger. The situation created for workmen and employers under these Acts was in the main one of *status* originating in peculiar undertakings at public law. The working class in general is assuming under modern conditions a standing that imparts to it rights and duties co-ordinated under a law of status different from that which governs the rest of the community. Although the single workman undertakes

labour under a contract of service and enters into relations with his employer by agreement, three facts modify this contractual arrangement—the tendency of special work to react on the whole personality of the men concerned with it, the association of workmen of the same trade into powerful unions organized for the protection of the interests of workmen and, lastly, the social welfare policy of the modern State. As a result the working mass has ceased to be a number of “hands” seeking employment and has become a *class* in consciousness and in law. It strives to set up certain standards of living, it prevents the “victimising” of single members, it claims work or maintenance for the unemployed. It is sufficient to refer to the provisions of the National Insurance Acts of 1911 (1 & 2 Geo. V., c. 55), and 1914 (4 & 5 Geo. V., c. 57), and of the Unemployed Workmen Act of 1905 (5 Edw. VII., c. 7), in order to substantiate the view that the treatment of class interests on the basis of a separate social status is not confined to economic speculation and political struggles, but is assuming a legal aspect.

Looking back on the fluctuations of the historical process we may say, I think, that the conception of status is winning back some of its ancient importance, because the modern State itself is being gradually transformed. It is not considered merely as the umpire and guarantor of relations between individuals, but as a leader in social work. It does not watch with indifference the competition between its members, but seeks to further their welfare and to harmonize their interests. As to work and labour it is not the detached agreement that is held to be decisive for the standing of the parties, but rather an estimate of the standard of living and of the social requirements of professional men.