

The Roman Colonate, Liberty and Justinian's «Humanity»

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Several constitutions issued by Justinian and referring to the *coloni* accentuated the importance of a solution to the problem of the status of their descendants. There have been numerous attempts in modern researches, beginning with the end of nineteenth century, to view this legislation from the humane perspective: FUSTEL DE COULANGES considers it harsh, as it was unfavourable for the *colonus* rendering his actual position close to slavery (1); P. COLLINET, in a study of some of these

1) FUSTEL DE COULANGES, *Le colonat romain. Recherches sur quelques problèmes d'histoire*, Paris, 1885, p. 117. — It is not here the place to cite the huge bibliography on the Roman Colonate. For the different theories see R. CLAUSING, *The Roman Colonate*, New York, 1925, recently D. EIBACH, *Untersuchungen zum spätantiken Kolonat in der kaiserlichen Gesetzgebung unter besonderer Berücksichtigung der Terminologie*, Köln, 1980, and B. SIRKS, *Reconsidering the Roman Colonate*, ZSS RA 110, 1993, pp. 131 sqq., n. 1.

laws, concludes that Justinian's attitude was on one hand ruthless and even contemptuous towards *adscripticii*, by which he meant those *coloni* who, although entered under their own name as small-holders in the tax-rolls, had sunk to the position of those working on another's land; on the other hand, his legislation relating to "normal" *coloni* born on to an estate (*originarii*, *originales*) was inspired by benevolence and humane principles (2). Finally DE DOMINICIS considers Justinian's policy towards all *coloni*, even those in *condicio adscripticia*, a position created, as he believes, by Justinian's laws, as humane and discovers in it signs of the emperor's concern for this class (3).

This is discussed from the aspect of modern ideas and standards of what is humane, but ignores two things: what did Justinian himself deem humane? Secondly, how much of what Justinian legislation introduced was new in this legal and social

For the personality of Justinian, see J.B. BURY, *History of the Later Roman Empire*, II, p. 423 (Dover edition, 1958); E. STEIN, *Histoire du Bas-Empire*, II, 1968, pp. 275 sqq.; G. OSTROGORSKY, *Geschichte des byzantinischen Staates*, München, 1963, pp. 63 sqq. For the Emperor's philanthropy, cf. H. HUNGER, *Filantropia, eine griechische Worttragung auf ihrem Wege von Aischylos bis Theodoros Metochites*, Österr. Akad. d. Wiss., philos.-hist. Klasse 1963, 12 sqq.; on his attitude towards the predecessors see F. PRINGSHEIM, *Die archaische Tendenz Justinians*, *Studi in onore di P. Bonfante* I, 1929, pp. 551 sqq. (= *Gesammelte Abhandlungen* II, Heidelberg, 1961, pp. 9 sqq.).

2) P. COLLINET, *La politique de Justinien à l'égard des colons*, *Atti del V Congr. intern. di studi bizantini*, Roma, 1939/1940, pp. 601 sqq.

3) M. DE DOMINICIS, *I coloni adscripticii nella legislazione di Giustiniano*, *Studi in onore di E. Betti* III, 1962, pp. 87 sqq.

domain and can we therefore speak of his personal attitude towards the problem?

The first is formulated in a constitution of 531-535 A.D., C.J. XI, 48, 23 in which the emperor at the outset considers his idea, not on what is humane, but what is inhumane: *Cum satis inhumanum est terram quae ab initio adscripticios habebat suis quodammodo membris defraudari et colonos in aliis terris demorantes dominos terrae maximis damnis adficere, censemus ... ita nec adscripticiae condicioni suppositus ex annalibus curriculum, quantacumque emanaverint, vel quacumque prolixa negotiatione aliquis sibi vindicet libertatem* — «As it is inhumane to separate *adscripticii* from the land on which they find themselves from the beginning as constituent elements and take on *coloni* who work on another's land, thereby causing enormous damage to those on whose land they are, we decree... thus also that he who is in the status of an *adscripticius* can no longer regain freedom, whether after a certain number of years or by some successful procedure: they must remain *adscripticii* and tied to the land». In this passage the emperor obviously considers the separation of *coloni* from the estate to be cruel to the land which would thus remain without its constituent elements and not towards the people, attempting to regain their freedom. Behind this lies fiscal interest: the land deprived of *coloni* remains uncultivated; what is not cultivated may not be taxed and so does not exist as far as the state is concerned and is therefore useless. What is useless to the state is inhumane.

This definition of inhumanity is Justinian's own idea. Previous emperors, also primarily endeavouring to ensure the regular payment of taxes, nonetheless formally link the concept of humanity to living people: so, Constantine in one constitution wonders if anyone could separate children from their parents, whether slaves or *coloni*, in the case of the division of an estate among its heirs (4). About the mid-fifth century, Valentinianus III considers it blasphemous (*impium*) to separate children of *coloni* from their parents in cases where one of the parents is free (5).

There is not much originality in Justinian's legislation on the *coloni* in general. In the main, he relies on older laws, summing up or correcting contemporary practice. In certain aspects Justinian's constitutions are sometimes contradictory, as they reflect the actual position together with the legal fiction that the *coloni* were *ingenui* and *liberi*.

The above-mentioned constitution C.J. XI, 48, 23 is crucial to the understanding of Justinian's legislation on the *coloni*. It envisages the following: *coloni* who were in the status of *adscriptionis* could not regain with time the freedom to leave the land on which they worked. If they freed themselves by flight,

4) C.J. III, 38, 11, A.D. 334: *Possessionum divisiones sic fieri oportet ut integra apud successorem unumquemque servorum vel colonorum adscripticiae condicionis seu inquilinorum proxima agnatio vel adfinitas permaneret. Quis enim ferat liberos a parentibus, a fratribus sorores, a viris coniuges segregari?*

5) Valentin. III Nov. XXXI, 2, 3, A.D. 451: *Quem casum iubemus vicariorum compensatione finiri ne, quod impium est, filii a parentibus dividantur.*

they still retained their previous status, so that their descendants, regardless of where they were born, remained bound to the first land-owner on whose estate the parents had been *adscripticii*. A law of Anastasius is quoted, according to which free *coloni*, who had spent thirty years on the same land, remained free but did not have the right to leave the land. Justinian refers to Anastasius for the regulation, not preserved in the Greek original of the same law (6) (C.J. XI, 48, 19), that children of *coloni*, if their parents had remained on an estate for thirty years, were free, but tied to the land just as their parents were. Owners with such *coloni* on their land were warned against introducing any innovation or using violence. Provincial governors were responsible for preventing injustices and for seeing that the old custom of paying dues was respected.

Justinian settled the question of fugitive *coloni* in the same manner as his predecessors: no one was permitted to receive *coloni* who had run away from another's estate. Once it was discovered that a man was a fugitive, he who was harbouring him was obliged to return him together with his *peculium* and his descendants; if not, he had to fulfil all public obligations for the

6) C.J. XI, 48, 23, 1: *Cum Anastasiana lex homines qui per triginta annos colonaria detenti sunt condicione voluit liberos quidem permanere, non autem habere facultatem terra derelicta in alia loca migrare, et ex hoc quaerebatur, si etiam liberi eorum cuiuscumque sexus, licet non triginta annos fecerint in fundis vel vicis, deberent colonariae esse condicionis an tantummodo genitor eorum, qui per triginta annos huiusmodi condicioni illigatus est: sancimus liberos colonorum esse quidem in perpetuum secundum praefatam legem liberos et nulla deteriore condicione praegravari, non autem habere licentiam relicto suo rure in aliud migrare, sed semper terrae inhaereant quam semel colendam patres eorum susceperunt... etc.*

time the fugitive had spent on his land. It was also envisaged that a *colonus* who had escaped from the land should be punished (7).

The rest of Justinian's constitutions complement or consider in more detail some of these basic premises: C.J. XI, 48, 20 regulates payment, both of agreed rent and taxation in the case of a dispute between a *colonus* and the land-owner: constitution C.J. XI, 48, 21 solves the question of the status of descendants from the marriage of an *adscripticius* and a slave or an *adscripticius* and an *ancilla*, citing earlier laws and concluding with the question: what in fact is the difference between a slave and an *adscripticius* when both are in the power of their master who could free a slave together with his *peculium* and drive an *adscripticius* off his estate? C.J. XI, 48, 22 first warns that a lease agreement on its own, just like a verbal or written statement alone, is an insufficient document or confirmation that someone is *adscripticius*: a certification of registration in the tax-rolls must be included. It then turns to the question of *adscripticius'* descendants in these laws: whether a son, while his father still lives and works on farm, must remain on the estate, the conclusion being that this is not obligatory. However, as long as a father, brother or kinsman is working on another's land, the son is considered to be *adscripticius* (8).

7) C.J. XI, 48, 23. For the punishment of *fugitivi coloni* see *ibid.*, pr.: ... *et si se celaverit vel separare conatus fuerit, secundum exemplum servi fugitivi sese diutinis insidiis furari intellegatur et sit suppositus una cum subole sua* ... etc. Cf. before Justinian: C.Th. V, 17, 1 (Constantine), C.J. XI, 53 (A.D. 371).

8) C.J. XI, 48, 22, 4: *In omnibus itaque huiuscemodi speciebus satis acerbum nobis videtur domino praeiudicari colonorum absentia eorum qui in*

In some cases Justinian refers to previous laws, once directly quoting Anastasius in C.J. XI, 48, 23. However, Anastasius' law known in the Greek version, C.J. XI, 48, 23, does not contain it in full; maybe Justinian had enlarged it arbitrarily or interpreted it freely. Firstly, the regulation stipulating that the owner whose estate a *colonus* has abandoned loses the right to seek his return after thirty years is not cited by Justinian, as in fact abolished by his constitution: regardless of how many years have elapsed, the previous land owner retains his right to the fugitive *colonus*; the latter does not achieve freedom and always remains tied to the land of the first owner. Secondly, Justinian quotes as Anastasian the regulation on the children of free *coloni* who remain free but lose the right to leave the land which their parents once undertook to cultivate. This regulation, however, is not contained in the Greek text of Anastasius' law, C.J. XI, 48, 19 (9).

Anastasius, whose constitution envisages that free *coloni*, as well as those who were dependant, after thirty years with the same *dominus* had no longer right to leave him, although remaining free, concludes that this is beneficial to both, *dominus*

rure nati et postea absentes per suos vel patres vel fratres vel cognatos agriculturam peragebant. cum enim pars quodammodo corporis eius per cognationem in fundo remanebat, non videtur neque peregrinari neque in libertate morari.

9) [Ἀὐτοκράτωρ Ἀναστάσιος Α.] in C.J. XI, 49, 19 is reconstructed on the basis of the text of C.J. XI, 48, 23. It seems not to be impossible that another constitution of Anastasius regulated the matter of the children of *coloni*.

and *colonus*. Such a measure might be useful to a *colonus* who after thirty years was certainly no longer young. There was a tendency in practice to replace older *coloni* by others or by slaves. The state had earlier protected *coloni* in this respect and a law of 383, C.J. XI, 63, 3, bans this practice. But here too it was more a matter of fiscal interest on the part of the Roman state than of the humanity of the emperor. The idea was to keep on the land the *capita* entered once in the tax-rolls, as only in this way could tax be levied on the estate. In order to keep its fiscal interests intact, the state in some cases, under Justinian as well as previously, under Licinius, counted as *capita* people who were no more living (10). It would seem, therefore, that Anastasius' law was, after all, at least useful to the land-owner: the previous possessor could no longer demand that his *colonus* be returned in the case that he still wanted him; after thirty years, the new *dominus* could no longer get rid of a *colonus* he no longer needed.

The constitution of Anastasius was the result of long experience in the application of *longi temporis praescriptio* to *coloni*. The rule was in force as early as in 400 A.D., C.Th. XII, 19, 2, the justification being that public and private affairs could not be dealt with on equal terms, the former were to be scrupulously protected. Whether the issue was one of *res dominica* or *actio privata*, the right to seek the return of a *colonus* or *inquilinus* was curtailed, if he had spent thirty consecutive

10) Cf. Euseb. *Vita Const.* 6; for Justinian's fiscal policy, see Procop. *Anecd.* XXIII, 6.

years in a *curia*, in a *collegium* or in a fort in the same province, or forty years in another (11). According to a law of 419 A.D., C.Th. V, 18, 1, *longi temporis praescriptio* as applied to *coloni*, regardless of where they spent the time, is restricted to thirty years: at the end of this period the owner of the land on which they once worked has no longer the right to seek their return. However, if a *colonus* originating on the estate leaves the land and spends less than thirty years away from it, whether as a fugitive or transferred by his own consent to another estate and if there is no shadow of doubt as to his status, he must return without hesitation or delay together with his family to the place where he was born. If fate should overtake him before that time, his descendants must go back, together with the property they possess; if the person in question is a *colona*, *longi temporis praescriptio* is restricted to twenty years. The question of descendants is dealt with separately (12).

This law left room for abuse and enabled those "who did not have freedom by birth to achieve it by fraud", according to a *Novella Valentiniani* III, from 451 A.D. (13). Frequently moving

11) C.Th. XII, 19, 2, A.D. 400 = C.J. XI, 66, 6: *Actiones publicas privatasque non eadem ratione concludimus, si quidem statui publico impensius providendum est. Eum igitur, qui curiae vel collegio vel burgis ceterisque corporibus intra eandem provinciam per XXX annos, in alia XL sine interpellatione servierit, neque res dominica neque actio privata continget, si colonatus quis aut inquilinatus quaestionem movere temptaverit.*

12) Mrs. Tiziana CHIUSI helped me kindly in a letter in interpreting this and subsequent laws concerning *longi temporis praescriptio* applied to *coloni*, but she is not responsible for my errors in this matter.

13) Nov. XXXI pr.: *Nulli umquam nisi colono fugitivo culpa sua praemium fuit.*

from one estate on which they worked to another and from one land-owner to another, these dependent *coloni* would eventually complete the thirty-years period. However, the new owner could not retain them as they did not belong to him, while the old one could not demand their return after elapse of thirty years. They therefore considered themselves free. Valentinian decreed that a *colonus* who fled in this manner from the estate on which he was born and managed for thirty years to evade the owner, should be retained by the land-possessor with whom he had spent the greater part of the thirty-years period or to the one by whom he worked last (14).

The decree of Anastasius that the *colonus* remains on the estate where he had spent a defined period of time could also be considered as a further stage in the evolution of earlier laws on the land-owner's right over him. However, it contains an important new departure: the restriction of the freedom of *coloni* in cases where they remained on the land of the same owner for over thirty years. After this time their position became similar to that of dependent, indebted *coloni* (*adscripticii, originarii*). Admittedly, they retained the right to dispose of their property but were deprived of the right to go when and where they liked. All previous laws regulating the practice of *longi temporis praescriptio* referred only to dependent *coloni*, those born on

14) *Ibid.*, 1: *Quod si propter conclusionem tricennalem et ad vim praescriptionis eludendam aequaliter habitet per diversos, is eum vindicet iure colonario serviturum, penes quem a die primae fugae triginta annorum posteriora tempora concluduntur; alias huic lucro cedat, cum quo maximam tricennii partem vagus et infidus habitator effecit.*

another's estate or those who had ended up as *adscripticii* because of rental arrears. Nobody had the right to demand the return of free, unindebted *coloni*, or to retain them on the land longer than they themselves wished.

The introduction of *longi temporis praescriptio*, although clearly showing the *coloni* — or their labour — to be chattels of the land-owner if they were in arrears of rent (15), nonetheless meant a restriction in terms of time on the landowner's rights to demand their return, thus inspiring *colonus'* hope of achieving freedom if he managed to evade this for thirty years. Valentinian III reduced this hope, while Anastasius gave every land-owner the right to retain *coloni* working on his land, regardless of whether they were *liberi* or *iuris alieni*.

There is nothing new in Justinian's legislation on the *coloni*; at the same time, it can hardly be claimed that it represents the end of a continuous development. From his predecessor Anastasius he inherited the regulation that free *coloni* after thirty years working on the same estate, although disposing of their property and considering themselves free, could no longer leave the land. In all other respects, Justinian's legislation is closer to that of Constantine than to the legislation of the fifth century. As in the time of Constantine, a *colonus alieni iuris* under Justinian could

15) The rule of the *longi temporis praescriptio* was applied to the slaves, but not to *coloni* before 400 A.D. Cf. J. PARTSCH, *Die longi temporis praescriptio im klassischen römischen Rechte*, 1906, especially pp. 90 sqq.; M. KASER, *Das römische Privatrecht*, II. Abschnitt, 1975, p. 148. — For an application of the *longi temporis praescriptio* on *coloni* see M. AMELOTTI, *La prescrizione delle azioni in diritto romano*, 1958, pp. 242 sq.; cf. D. NÖRR, *Die Entstehung der longi temporis praescriptio*, Köln, 1968.

not leave either land or *dominus*; the latter had unlimited time in demanding his return; if a fugitive *colonus* was found, the tax for the time he had been away was paid by the owner on whose land he was discovered; fugitives were also punished. Descendants of *coloni* had to remain on the land on which they or their parents worked (16).

Longi temporis praescriptio which in the early fifth century curtailed the right of the *dominus terrae* to demand the return of a *colonus* after thirty years, was abolished by Justinian's law of 531-535 A.D. The *colonus* remained *ingenuus* insofar that the proprietor of the land he was working could not sell him. He

16) C.Th. V, 17, 1, A.D. 332: *Imp. Constant. A. ad provinciales. Apud quemcumque colonus iuris alieni fuerit inventus, is non solum eundem origini suae restituat, verum super eodem capitacionem temporis agnoscat. Ipsos etiam colonos qui fugam meditantur in servilem condicionem ferro ligari conveniet, ut officia, quae liberis congruunt, merito servilis condemnationis compellantur implere.* — A similar measure was provided by Justinian in C.J. XI, 48, 23, 4-5: *Nemini autem liceat vel adscripticium vel colonum alienum scienti prudentique in suum ius suscipere. Sed et si bona fide eum susceperit, postea autem reppererit eum alienum esse constitutum, admonente domino vel ipsius adscripticii vel terrae et hoc faciente per se vel per procuratorem suum hunc restituere cum omni peculio et subole sua. Et si hoc facere supersederit, omnis quidem temporis, quo apud eum remoratus est, publicas functiones sive terrenas sive animales pro eo inferre compelletur cura et provisione tam eminentissimae praefecturae quam praesidis provinciae. Coartetur autem et sic ad restitutionem eius secundum veteres constitutiones et poenas eis insertas* (A.D. 531-534). — P. COLLINET, *op. cit.*, p. 601, supposed that the cited constitution of Constantine was not included in the Codex Iustinianus because Justinian's attitude towards the *coloni* was not so merciless as was Constantine's.

For an interpretation of C.Th. V, 17, 1, cf. W. GOFFART, *Caput and Colonnate, toward a History of Later Roman Taxation*, 1974, pp. 71 sqq.; D. EIBACH, *op. cit.*, n. 1; in a different way, M. MIRKOVIĆ, *Colonus iuris alieni and taxation, Opus 5*, 1986, pp. 53 sqq. For punishment of fugitivi, see n. 7.

could, however, be prevented from going where he pleased, from performing curial duties or taking holy orders. This, therefore, was no longer a free man corresponding to the definition of *liber homo* in the Digesta: *et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur* (17). The *dominus fundi* had no right to the person of the *colonus* but could dispose of his time and his *operae*. So his status might be explained by a definition in *Pauli sententiae XVIII: Homo liber qui statum suum in potestate habet et peiorem eum et meliorem facere potest: atque ideo operas suas diurnas nocturnasque locat*.

Justinian's legislation referring to the descendants of *coloni* caused confusion and the emperor was to revert to this in *Novella 162*, of 539 A.D. in order to confirm that descendants of a free mother and an *adscripticus* were free but could not leave the land. This was permitted only in the case of acquiring their own land, sufficient to maintain themselves and their family (18).

When summing up all that was envisaged by Justinian's legislation relating to *coloni*, the question of whether his policy towards this social class was humane or harsh appears to be out of place. Like his predecessors, Justinian was in fact indifferent to the fate of *coloni*. The single aim of this legislation was to protect fiscal interests of the Roman state. In this neither *coloni* nor land-owners were protected. It sometimes seems as if the

17) Flor., Dig. I, 5, 4.

18) Nov. 162 (A.D. 539).

laws were on the side of the land-owners; however, behind this always lurks the state's intention to prevent *coloni* from leaving land by giving the proprietor the right to keep them. The only important thing was to ensure regular payment of taxes within the *capitatio-iugatio* system in which, if there was no labour on the land, it cannot be taxed. A striking example of Justinian's attitude and intention towards both *coloni* and land-owner is provided by his constitution C.J. XI, 48, 20, 3a of 529 A.D. which deals with the payment of tax in the case of dispute between *adscripticius* and *dominus*: *Sin autem moris erat dominos totam summam accipere et ex ea partem quidem in publicas vertere functiones, partem autem in suos redditus habere, tunc, si quidem fideiussor a colonis detur, eundem fideiussorem dominis sine praeiudicio litis tantam summam inferre, quantam tributa publica faciunt, ut a dominis publicis rationibus persolvatur*. If it was the custom that the land-owner takes the whole sum and give a part to the state as tax, keeping the other as revenue, in the case when the *colonus* had given a surety, the latter shall without prior dispute, give to the state the amount of a tax due.

As Justinian in his legislation about *coloni* returned to the main principles fixed in Constantine's law on *coloni*, C.Th. V, 17, 1, A.D. 332, he maintained also the same harshness towards fugitive *coloni*. Even in regulating the position of the descendants of *coloni*, Justinian's legislation does not reflect the process of gradual deterioration of the *colonus*' position.