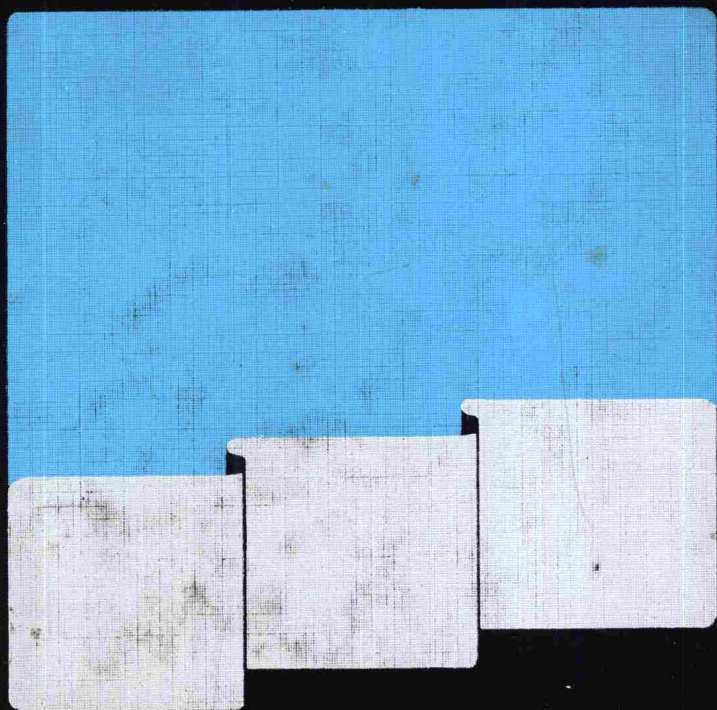


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Part I

SYMPOSIUM

Legal Status of Foreign Workers

France

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Introduction

France is by tradition a land of immigration. From the moral point of view, it has always appeared to be a refuge generously welcoming refugees from all horizons. From the social point of view, its weak demography has imposed a widespread call for foreign labor.

At the beginning of the twentieth century, immigration was facilitated because France's demographic decline was exacerbated by the deaths of World War I, so access to the French territory was not subjected to any restriction. But the advent of an economic crisis obliged the public authorities to establish immigration control. The law of 10 August 1932 laid down employment quotas for foreigners according to profession, and submitted their work in France to administrative authorization. This control was reinforced in 1935 and 1938.

Just after World War II, immigration was once again encouraged to fill the demographic voids and to facilitate the reactivation of production, but the French State intended to control it. To this effect, it promulgated the ordinance of 2 November 1945. This text dictated the juridical rules for foreigners in France and created a public office, the National Office of Immigration (NOI) which was granted the monopoly of recruitment abroad and of the workers' introduction to France. That new immigration wave would increase with the industrial growth of the 1960s. The foreign work force was solicited more and more to occupy the less qualified jobs refused by French workers. From 1958 to 1974, more than two million immigrants settled in France. Moreover, very many of these entries were accomplished in non-conformity with the procedure defined in 1945; the situation of clandestine foreigners was then regularized as soon as they had a job.

This influx of foreigners has not occurred without causing problems. France's employment crisis for the last few years has forced the State to restrict considerably the access of foreigners to the national employment market. First, a circular letter of 5 July 1974 interrupted

the introduction of permanent foreign workers; then a circular letter of 27 July 1977 forbade regularizations, and finally in a decree of 10 November 1977 the admission of foreign workers' family members to France was subjected to the condition that they promise not to request access to the employment market. In order to decrease the number of foreigners in France, return-trip financial aid was also instituted, concretized by the delivery of cash to the foreigner who had worked in France for at least five years and who was willing to return to his native country. These measures have not entailed a global reduction of the number of foreigners in France, but they have nevertheless stopped the introduction of new foreign workers. From 1975 to 1980, foreign labor has shown a development of only about 110,000 people, mainly refugees from Asia or members of the European Common Market.

Today, the foreign population of France is estimated at about four million, or about seven per cent of the total population. Among these, the Portuguese and the Algerians are the most numerous (more than 800,000 people for each of these nationalities), followed by the Italians and the Spanish (about 500,000 for each of these two nationalities) and Moroccans (about 300,000). Also notable are important contingents of Tunisians, Poles, French-speaking black Africans and Yugoslavians. About 1.7 million of these foreigners are workers, which accounts for a little over eight per cent of the active population.¹ The work activity rate of foreigners is a little bit higher than that of nationals, but such modest proportions indicate that immigration to France is largely familial immigration.

This type of immigration explains the difficulties encountered by immigrants relative to reception, lodging and education. However, we will leave these problems aside in order to study solely the foreigner's situation as a worker.

The working conditions of foreign labor are far from excellent. Considered as an available work force that can easily be displaced from one site to the next and brutally discharged, foreign workers are often exploited by employers. The latter resist with difficulty the temptation of hiring a clandestine worker in France, for they are thus able to avoid declaring him to the social Security and to escape paying fees. In addition, they know that such a worker will be satisfied with low remuneration and will not dare to protest because he is breaching the law. The material conditions of the foreign worker often reflect his juridical condition. One has only to glance at the past to find proof of this fact.

For too long, the French State was only interested in the economic aspect of immigration. The legal and regulatory dispositions regarding foreign workers essentially aimed at incorporating them in the national economy. This regulation had two main faults. On the one

hand, it was ill-adapted. The establishment of a procedure for straightening out illegal situations relegated to secondary importance the official procedure for introducing foreign workers, depriving the public authorities of any possibility of immigration control, and allowed for the development of clandestine immigration, source of numerous abuses. The multiplication of texts of various origins and natures had heightened this lack of adaptation. Indeed, besides the legal sources like the ordinance of 2 November 1945 or the provisions of the Work Code, there were very numerous complementary sources, mainly decrees, circular letters and administrative memoranda. This was an occult system of regulation whose contents were known with difficulty, but whose effects on the condition of foreign workers were far from being unimportant. Moreover, the problem of the juridical value of these complementary sources has been raised many times and the Council of States has often annulled provisions dictated by circular letters regarding foreign workers, arguing that they had been made by an incompetent authority. On the other hand, this regulation was insufficient with regard to the social protection of foreign workers. The preamble of the 1946 Constitution, to which the 4 October 1958 Constitution refers, asserts that no one can be wronged in his work or his job because of his origins. The application of this principle presumes the assimilation of foreign workers to French workers, but this assimilation has only been achieved very slowly.

Public authorities were preoccupied with this situation and finally realized the disastrous social consequences of the 'untamed immigration'. The search for a global immigration policy, rendered necessary by the economic crisis of the years 1974–1975, was then undertaken. This policy was set up progressively under the stimulus of the then President of the Republic, Valéry Giscard d'Estaing. From the start of his presidential campaign, he clearly announced his will to inform immigrants of their rightful situation, resulting from their participation in the development of the national economy. This will was confirmed by the nomination of a Secretary of State for Immigrant Workers in May 1974. In October of the same year, twenty-five measures describing the guidelines of a global policy of immigration, were adopted by the Council of Ministers. Pluriannual programs were signed with local communities with the idea of including them in the measures taken in favor of the immigrants.

There are two main axes of this policy: the stopping of all immigration, and the improvement of the social situation of immigrants already settled in France. The State wanted to assure the means of accomplishing its policy by developing the administrative services concerning foreigners and by increasing the share of the budget dedicated to those problems. But the economic difficulties and

the increase in unemployment did not allow it to continue along the path it had traced. The restrictive measures taken towards the immigrants concerning access to employment, still using the questionable technique of the circular letter, and especially the voting of the law of 10 January 1980 pertaining to admission conditions, length of stay and expulsion of foreigners, signalled a change in the French immigration policy.

Anxious to satisfy a public opinion turned hostile to the presence of numerous immigrants, the State decided to get rid of those who became economically useless. In multiplying the expulsions and in making expulsions easier, the law of 1980 abused somewhat the rights of the individual.

The effects of this policy would be weakened by the rise to power of a socialist government in May 1981.

The new government decided to improve immediately the living conditions of immigrants already residing in France by putting an end to the precariousness of their status. It started by interrupting all expulsions and undertaking a vast operation of regularization of clandestine workers. Then it proposed three laws regarding the immigrants. The first was the law of 9 October 1981 which suppressed the restrictive dispositions regarding associations directed by foreigners. The second was the law of 17 October 1981, modifying various provisions of the Work Code concerning the employment of foreign workers in illegal situations. This law included a first, repressive part. More severe sanctions would in fact be applied to employers who hired foreign workers in illegal situations. The second part of the law granted the protection offered under the main provisions of the Work Code to unlawfully employed foreigners. This law aimed at breaking the often-established connivance between the faulty employer and the necessitous foreign accomplice. It should, thanks to its dissuasive character, limit clandestine work. The law of 29 October 1981 relative to admission conditions and length of stay of foreigners in France, completed the purview of the new French immigration policy. This text, repealing the law of 10 January 1980, provided for more rigorous control of the admission of foreigners to France and minimum juridical security for those residing in our territory. It notably increased the judicial guarantees for foreigners likely to be repelled or expelled.

The new measures reflect a different state of mind with regard to immigrant workers, especially if one compares them to the last decisions taken by the previous government. Methods seem to have been modified.

Thus, the State intends henceforth to settle problems by legislative process. It has certainly solved a few problems by circular letters, but has been careful to publish them in the *Journal Officiel*. However, the

aims of the French government's policy, as they have been specified by the Prime Minister in a declaration of general policy dated 8 July 1981 and as they emerge from the first adopted texts, are very different from those defined in 1974. In fact, the new French policy is characterized by an admissions limitation for foreign workers and by an extension of their rights.

Limitation on Admission of Foreign Workers

A control of the migratory influx is indispensable for the success of any immigration policy. One of the first contemplated means of obtaining this objective is to make access to the national territory more difficult for foreigners. The law of 29 October 1981 which reinforces the severity of border control, proves that the French State has committed itself to this course.

According to the terms of this text, any foreigner must, in order to enter France, possess the documents (passport) and visas required by the regulations in force. In addition, the government can, by means of a decree by the Council of State, demand the presentation of a guaranty of repatriation (for example, a bail-bond granted by a financial institution or an untransferable return trip ticket) or any other document relating to the subject and conditions of his stay. The foreigner must also be in possession of all documents necessary to the exercise of a professional activity, if he intends to pursue one. But these conditions can be eased by means of international agreements.

The presentation of these documents and proofs confers the right to enter French territory. Nevertheless, even if these are furnished, access to this territory can be refused to any foreigner whose presence would constitute a threat to the public order, or who is prohibited from entering the territory, or who is under a deportation order.²

It has been shown, however, that border control, no matter how strict it is, is insufficient to prevent the arrival of foreigners seeking work. Other measures seem better adapted. The first one consists of restrictive regulation of foreign access to jobs. Such regulation has existed in France for a number of years. But this measure is not effective in the fight against clandestine employment of foreigners. As a matter of fact, nothing will stop immigration, if foreigners can continue to hope to find work in France. The public authorities have thus decided to go to the root of the evil in suppressing the cause of clandestine immigration. To do so, they have tried to discourage employers from calling on clandestine labor by heavily penalizing the non-adherence to the regulation.

The Regulation of Access to Employment

At first sight, it would seem that there are two stages: that of admission to France and that of hiring; but in reality, as a distinguished author³ has rightly noticed, these two phases are closely linked, because the entire immigration policy consists precisely of adapting the number of admissions to French territory to that of the work posts likely to be filled by foreigners.

It would be more appropriate to draw a distinction between the legal provisions regarding those who have never worked in France and those regarding the ensemble of the foreign workers, including those who have never worked in France and those already in the national employment market. The first ones can be qualified as measures relative to hiring, the second ones, measures relative to employment.

(1) The Hiring of Foreign Workers

The supposed principle is that it is not possible to enter France freely in order to work for a salary. Our law has thus established a procedure that subordinates the foreign worker's entry to France to an admission request made by the employer. But in certain individual cases this admission procedure is replaced by a simplified regulation.

(a) The admission procedure. This procedure, which one must not forget has been suspended since 1974, with certain exceptions, took place in several stages.

First, the introduction of foreign workers was bound by preliminary formalities. The circular letter of 23 February 1972 considered that each admissions request was a job offer and that it would be advisable before deciding on it to see if a worker could be found in the national employment market⁴ capable of filling the offered job. A compensation procedure, meant to protect the national employment market, was thus instituted. In practice, it operated in the following way: five weeks before being able to present an admission request for a foreign worker, the employer had to notify the offices of the National Employment Agency of a job available corresponding to the post offered to the foreigner. The Agency verified if the offered job was suitable for a worker already integrated in the national employment market and, if not, certified the submission of the job offer.

Provided with this certificate, the employer could put together an introductory file, which comprised two essential documents: a labor contract and a document pertaining to the worker's lodging.

The labor contract was strictly regulated and differed in many ways from the labor contract of common law. First, it had to be written. After the passage of the law of 31 December 1975 pertaining to the use of the French language, the contract had to be written in French.

However, the foreign worker could ask for a translation of it in his native tongue. Also, these two texts were both authentic before the law, but in the case of disagreement between them, only that written in the wage-earner's native tongue could be used against him.⁵ This contract had to be for a minimum duration of one year and had to include a minimum of mandatory references. Besides information concerning the required qualifications, the nature and characteristics of the proposed activity, the contract had to specify the wages to be received by the worker. These wages had to equal those earned, for the same job, by a French worker. In fact, the contract had to conform to a standard, model contract drawn up by the Department of Employment. It could take two forms: it was personal if the employer knew the name of the person he wished to employ; it was anonymous in other cases.

The document pertaining to the worker's lodging had been instituted by a 1972 circular letter. The idea arose from good intentions: the point was to solve the crucial problem of the foreign workers' lodging by deciding that in the future no foreigner would be allowed to obtain authorization for staying and working in France if lodging was not assured 'in decent conditions and at a normal price'. To allow for a control as effective as possible of these provisions, a special form containing information on this lodging had to be filled out and signed by the employer. This lodging certificate was an integral part of the work contract. But, such linking of lodging to employment could prove to be dangerous for the wage-earner. The loss of the lodging could annul the work contract, with possibly severe prejudicial consequences to the worker. Likewise, the breach of the work contract could result in the withdrawal of the lodging authorization. A case brought before the Council of State by a foreign worker and labor union had these provisions cancelled, because they had been drawn up by incompetent authorities.⁶ The decree of 21 November 1975 restored the provisions pertaining to lodging, taking care to dissociate them from the work contract. Henceforth, the employer's obligation to assure or to have assured the foreign workers' lodging in normal conditions is essential to their admission to France but not a condition for validating their contract. However, the employer's obligation is limited, because he himself is not required to assure the foreign worker's lodging; it suffices that he guarantee the availability of lodgings, for which the foreign worker will almost always pay the rent. In order for the administration to control the employer's adherence to his obligation and to appraise the characteristics of the lodging, this employer is required to fill out a form which he encloses in the introductory file. In firms of more than 49 employees, a copy of the joint production committee's resolution must accompany the form; indeed the law dictates the consultation of the committee on the

potential foreign workers' lodging conditions.⁷ The employer is exempted from filling out the form pertaining to the lodging if it appears that the worker is likely to find accommodation easily, for example, due to a high salary or the presence of members of his family in France.

Thus constituted, the introductory file is handed over to the administrative departments of the National Employment Agency. These administrative departments then have eight days to appraise the various components of the file and to forward it, with their justified opinion, to the Departmental Board of Work and Employment which has the right to rule on the introduction in some limited cases.⁸ For the remaining categories of workers, by far the most numerous, it forwards the file with justified opinion to the head offices of the Department of Employment, which decide.

Indeed, as a general rule, the head offices of the Department of Employment are the ones which decide to authorize or not the introduction of the foreign worker. They base their decision on a certain number of elements, and in particular on the employment situation. However, it is fitting to note that, despite job availability, certain categories of workers cannot be refused work, either due to sustained links between France and the workers' native country, or to the services they have personally rendered to France, or to their length of stay in the country, or to human considerations. A departmental order of the Minister of Employment enumerates these categories.⁹

If the introductory request is denied, the employer is notified. If it is approved, the contract, stamped with the necessary visas, is forwarded to the National Office of Immigration (NOI) which, through its foreign missions, proceeds with the material operations of recruitment. If the contract is anonymous, the NOI will search for the necessary personnel locally; if the contract is personal, the Office only contacts the designated worker. The NOI will then have the foreign worker undergo a medical check-up¹⁰ and make him sign the contract presented by the employer; then it will organize his trip to France and will direct him toward the place of his employment. At the end of this procedure, the NOI will hand over a work permit and a visiting permit to the foreign worker. For his part, the employer must then pay the NOI a contribution for the service rendered. This is composed of an ordinary fee, intended to cover hiring expenses and occupational selection, and of an additional lump sum contribution earmarked for the development of social actions dependent on the NOI.¹¹ The Work Code explicitly forbids that the employer require the foreign worker to reimburse the sums required for his hiring by the NOI.

Such are the characteristics of the normal hiring procedure for

foreign workers. This procedure is nevertheless waived in a number of particular cases.

(b) The particular cases. There exist some hiring procedures for foreign workers that differ from those just described. These procedures can be regrouped into two categories: those pertaining to foreigners who entered France without a work contract and who wish to have access to the national employment market; and those pertaining to the citizens of countries having concluded an agreement with France. The first ones can qualify for exceptional procedures; the second for conventional procedures.

There are two exceptional procedures. The first is the regularization procedure. Born out of administrative experience, it was institutionalized in 1964, the State having decided to show proof of liberalism towards workers whom the national economy could hardly dispense with. Indeed, this procedure allows the foreigners who entered France on their own initiative or through agents or go-betweens and who found a job, to regularize their situation and to obtain the normally required authorizations to pursue a job. It differed little from the introductory procedure. It had the same essential characteristics, particularly the same requirement of a work contract concluded for a one-year period, accompanied by a document pertaining to the worker's lodgings. The only originality lay in the fact that the administrative formalities had to be accomplished not by the employer, but by the foreigner himself.

The regularization procedure rapidly became the normal recruiting method for foreign workers: in 1968, it was used by almost eighty per cent of the foreigners who had acceded to the employment market. Such a situation no longer allowed the State to control the influx of labour effectively. Thus, a decision was taken to make regularization much more difficult. Some restrictive arrangements were formulated in 1973 and 1977. Since then, the regularization procedure has been entirely exceptional. Now, it is only possible for refugees and stateless people, for French spouses, for highly-qualified foreigners, for the persons to whom employment cannot be refused, and for the spouses and minor children of foreign workers who have received the authorization to settle in France in the framework of a family regrouping.

The second exceptional procedure is the work permission procedure. This one applies to the foreigner already settled in France, who has a visiting permit and who asks to pursue an occupational, paid activity, either for the first time, or after a work stoppage during which his previous work permit expired. The foreigner must obtain an authorization to work. The procedure is the same as in the regularization of a situation. However, there is neither a preliminary submission of a job offer, nor payment of the fee or lump sum contribution, nor

medical control. It is appropriate to mention that certain categories of foreigners have full right to a work permit: they are given a work permit without producing a work contract.¹² The work permission procedure is rarely used. For one, foreigners who fulfil the qualifying conditions are few, and for another, the Department of Employment refuses permission to most of them, based on the employment situation. In fact, the procedure essentially favours the spouse and children of foreign workers already settled in France, because since the decree (*arrêté*) dated 5 August 1981, they can no longer be refused permission on the basis of the employment situation.

As to conventional procedures, France has signed immigration conventions with the majority of labor-supplying countries. Most of these conventions subject foreign citizens to the common law introductory procedure, or only modify it slightly. Thus, the Franco-Portuguese Agreement of 11 January 1977 fixes forty years as the authorized upper age limit for coming to work in France.¹³

French-speaking Black African citizens certainly profited from a very liberal administration for several years, since they escaped recruiting by the NOI and were obliged to have neither a title to visit nor a work permit. But now, they must conform to the common law procedure. Only the Centraficans, Congolese, and natives of the Republic of Chad are still exempt. Today, aside from these last three cases, the only conventional procedures truly permitting exceptions concern the Algerians and the citizens of the European Economic Community.

An agreement between France and Algeria was concluded on 27 December 1968, establishing rules for the movement, employment, and sojourns of Algerians and their families in France. This agreement, which limits the number of Algerians allowed to come to work in France each year to 35,000, provides for a very special introductory procedure. The Algerians are actually introduced to France by the Algerian National Labour Office which gives them a permit after medical examination. Furnished with this document, the Algerians can stay freely in France for nine months in order to look for work. As soon as they have found work, a residence certificate, good for five years and renewable, is delivered.

Algerian worker recruitment has been extremely limited, however, in the past few years. The Algerian government, indeed, suspended emigration of workers by a unilateral decision dated 19 September 1973 in order to protest against a series of serious incidents which victimized a certain number of Algerians in France. Besides being a protest for the respect and dignity of Algerian subjects, the measures taken by the Algerian authorities were a deeper reflection of a consciousness of the long-term negative effects of emigration, especially socially. Both governments negotiated with the idea of encour-