CHAPTER 5

Discrimination Based on Race

The Story of Moroccan SNCF Workers in France

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5.1 INTRODUCTION

The European political project has long been presented (and indeed still is) as a vision built on two imperatives: peace and economic prosperity. By contrast, scant attention has been paid to the postcolonial and totalitarian legacies of the European political project and European law. A handful of groundbreaking studies have nevertheless explored the issue from the latter perspective. These include the book by Christian Joerges and Navraj Singh Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, which examines the persistence of economic models and rationales inherited from totalitarian regimes.[1] In France, Antonin Cohen has highlighted the ambiguous genealogy of the term *Communauté* (Community), part of the Vichy legacy that gave rise to the European communities.[2] Other studies have also focused on colonial legacies in relation to the construction of Europe.[3] From the very beginnings of European integration (1946–1957), a number of countries were confronted with the aspirations of

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[1] C. Joerges and N. S. Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (Oxford: Hart Publishing, 2003).

[2] A. Cohen, *De Vichy à la Communauté européenne* (Paris: Presses Universitaire de France, 2012).

[3] H. Peo and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (London: Bloomsbury Publishing, 2014); J. Silga, 'The Ambiguity of the Migration and Development Nexus Policy Discourse: Perpetuating the Colonial Legacy?' (2020) 24 *UCLA Journal of International Law and Foreign Affairs* 163.

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colonized peoples seeking to emancipate themselves from their respective empires.

The Indonesian revolution ended in 1949 with the defeat of the Netherlands.[4] The massacres of Sétif and Guelma (May–June 1945), the revolt in Madagascar (1947), and the war of independence in Indochina (1946–1954) challenged France's traditional colonial domination. After the signing of the Treaty of Rome, Belgium, for its part, was faced with the Congolese crisis (1960–1965), which marked the birth of the Organisation of African Unity and the pan-Africanist aspirations that accompanied it.[5] While post-war Europe was building itself around a political ideal of peace and economic prosperity, and seeking to erase the cumbersome legacies of its authoritarian regimes and colonial domination, colonial violence remained more present than ever outside the borders of the *Communauté*, as witnessed by the Suez crisis of 1956. Colonial domination, criticized by the emerging new international order, was being transformed and replaced by the concept of development.[6] By development, one should understand the presupposition of the progressive nature of industrialized countries compared to the countries referred to at the time as the 'Third World'. Borrowing from the evolutionary model, most economic theories of development attempted to 'naturalize' the causes of underdevelopment in the countries of the Global South by attributing them to several intrinsic factors that led to their backwardness – rather than to their colonial history.

The naturalization of underdevelopment has been roundly criticized by a number of economists, including Samir Amin and Thandika Mkandawire.[7] Drawing on the neo-Marxist tradition of dependency theories, these authors interpret underdevelopment as a process of incorporation of 'third-world' countries into the global capitalist system.

[4] D. Van Reybrouck, *Revolusi. L'Indonésie et la naissance du monde moderne* (Arles: Actes Sud, 2022).

[5] Y. Zerbo, 'La problématique de l'unité africaine. (1958–1963)' (2003) 212 *Guerres mondiales et conflits contemporains* 113.

[6] A. L. Stoler and F. Cooper, *Repenser le colonialisme* (Paris: Payot, 2013), pp. 98–103.

[7] S. Amin, *Accumulation on a World Scale. A Critique of the Theory of Underdevelopment* (New York: The Monthly Review, 1974); T. Mkandawire and A. Olukoshi (eds.), *Between Liberalisation and Oppression: The Politics of Structural Adjustment in Africa* (Dakar: Codesria, 1995).

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The signing of the first partnerships between the European Economic Community (EEC) and Africa, founded on an ideology that glorified Eurafrica, was a vector for the integration of Africa into the economic order promoted by Europe.[8] In this context, the African continent represented a source of raw materials that could guarantee a certain number of strategic supplies for European industry. The colonial pact lived on in the economic and development arenas, making Africa – and the Caribbean – a reservoir of cheap resources at the disposal of the European continent.

'Third-world' economists such as Raúl Prebisch, Hans Singer, and Jagdish Baghwati described this unequal balance of power as a deterioration in the terms of trade. Despite this criticism, a number of non-socialist African states saw the EEC's functionalist project as an ideal to be attained, hence the emergence of the Economic Community of West African States in 1975 and, subsequently, the West African Economic and Monetary Union in 1994.

There has been little discussion of the views of African intellectuals on the creation of the EEC. The advent of the EEC coincided with the fulfilment of pan-Africanist aspirations. In two seminal articles, Guy Martin, one of the leading thinkers on the subject, argued that the agreements signed between the EEC and African countries (the Yaoundé I and II Conventions signed in 1964 and 1971, and the Lomé Convention signed in 1975) helped to maintain pre-existing relationships of colonial domination.[9] In other words, the signing of these agreements perpetuated African countries' extroversion and dependence on the EEC. To quote Kwame Nkrumah: 'The State which is subject to [the said processes of dependence] is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside.'[10]

[8] Yaoundé I Convention (1964), OJ 1964 1431/64; Yaoundé II Convention (1971), OJ 1971 L 282/1.

[9] A. Mazrui, 'African Attitudes to the European Economic Community' (1963) 39 *International Affairs* 24; G. Martin, 'Les relations économiques Europe-Afrique dans le cadre de la convention de Lomé: néo-colonialisme ou nouvel ordre économique international?' (1979) 4 *Afrique et Développement* 57; G. Martin, 'L'Afrique face à l'idéologie de l'Eurafrique: Néo-colonialisme ou Panafricanisme?' (1982) 7 *Afrique et Développement* 5.

[10] K. Nkrumah, *Africa Must Unite* (Bedford: Panaf, 1963), p. 9.

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The analytical grid provided by dependency theories sheds light on the asymmetrical relationships that continue to exist between the North and South. Other studies have shown that the integration of the economies of the South would not have been possible without support from bourgeois class interests that were also part of the global capitalist system.[11] This chapter will build on these two premises (namely, the extroversion of African countries and the convergence of interests between the dominant classes of the South and North) to move forward in this discussion. In a recently published book, Megan Brown shows that during the Treaty of Rome negotiations, the issue of the free movement of workers, particularly Algerians, gave rise to significant tensions.[12] Although Algeria was still part of French territory in 1957, the common arrangements regarding the free movement of European workers did not apply to it. Article 227 of the Treaty of Rome fails to grant Algerian workers enjoyment of the free movement of workers and the ensuing social protection. To that end, the Treaty of Rome used the term *travailleurs des États membres* (workers from Member States) rather than *travailleurs nationaux* (national workers).[13] As Hanna Eklund notes, Article 135 of the Treaty of Rome distinguishes between two categories of workers: workers from Member States and workers from 'the overseas countries and territories'.

The aim of this article is to illustrate the colonial – and discriminatory – legacy attached to the status of workers from former colonies, by examining the treatment of Moroccan workers at France's state-owned national railway company the Société nationale des chemins de fer français (SNCF).[14] The mechanism excluding Algerian workers from the

[11] I. Wallerstein, *The Modern World System* (Oakland: University of California Press, 1976); J. Depelchin, *From the Congo Free State to Zaire (1885–1974): Towards a Demystification of Economic and Political History* (Dakar: Codesria, 1992), pp. 182–208.

[12] M. Brown, *The Seventh Member State: Algeria, France, and the European Community* (Cambridge: Harvard University Press, 2022), pp. 132–143.

[13] H. Eklund, 'People, Inhabitants and Workers: Colonialism in the Treaty of Rome' (2023) 34 *European Journal of International Law* 850–853.

[14] It is impossible to review the history of the railways in France within the scope of this article. However, it should be noted that the SNCF (French National Railways) was formed by the partial acquisition by the state of five large private companies in 1937. Complete nationalization took place following the Second World War.

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free movement of workers was not unique in this respect.[15] This chapter will illustrate the discriminatory treatment of Moroccan workers despite the entry into force of both the Charter of Fundamental Rights of the EU (CFREU) and, more importantly, the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, pp. 22–26, hereinafter the Race Equality Directive.

In 1963, France signed an agreement with the Kingdom of Morocco on exchanges of workers.[16] Article 8 of the agreement stipulates equal treatment for French and Moroccan workers.[17] Roughly 2,000 Moroccan workers were hired to fill menial positions in the railway sector: they were referred to as auxiliaries.[18] As will be shown, the concept of auxiliary workers became a device through which to discriminate based on race. Belgium, the Netherlands, and Germany also signed several labour exchange agreements with Morocco in 1963.[19] These agreements laid the foundations for the signing of the first Euro-Mediterranean agreement (signed with the Kingdom of Morocco) in 1996.[20] The agreements raise

[15] On Great Britain: K. H. Perry, *London is the Place for Me: Black Britons, Citizenship and the Politics of Race (Transgressing Boundaries: Studies in Black Politics and Black Communities)* (Oxford: Oxford University Press, 2016).

[16] Labour Agreement of 1 June 1963 between France and Morocco, enacted in France by Decree no. 63/779 of 27 July 1963 promulgating the Labour Agreement of 1 June 1963 between France and Morocco.

[17] Article 8: 'Moroccan workers on French soil shall enjoy the same treatment as French workers with regard to hygiene, working conditions, safety, housing, wages, paid holidays and unemployment benefits. The French government shall take the necessary steps to ensure that these workers receive the best possible welcome in France, particularly as regards transport conditions, the organization of canteens, and medical assistance. In addition, until such time as a special agreement on social security matters has been concluded between France and Morocco, Moroccan workers in France shall continue to benefit in this respect from the status they enjoyed on the date of signing of this Agreement.'

[18] The auxiliary employment system is derived from the contract of service, which established a highly precarious employment relationship. This system has been applied to lower-level workers in the company since the end of the nineteenth century.

[19] N. El Qadim, *Le gouvernement asymétrique des migrations. Maroc/Union européenne* (Paris: Dalloz, 2015).

[20] EC/Morocco Euro-Mediterranean Agreement of 26 February 1996 Establishing an Association between the European Communities and Their Member States, on the One Part, and the Kingdom of Morocco, on the Other Part. Entry into force: 1 March 2000 (OJ 2000 L 70, 18 March 2000).

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fresh questions about the nature of asymmetrical relations between the EU and non-member countries that are former colonies. Aside from the asymmetrical relation in terms of trade, as mentioned above, a further question is why and how EU law never managed to eradicate colonial-era legal practices, notably discriminatory practices, on the national level.

Most of the Moroccan workers at the SNCF were deprived of their basic social rights. They received significantly lower pay than nationals for equivalent work, their retirement pensions were well below that of permanent staff, they were denied access to vocational training throughout their careers, and they also lacked access to healthcare and certain social benefits. Enjoyment of these social rights was restricted to permanent railway staff of French nationality. This legal privilege is set out in what is usually referred to as the nationality clause, another way of safeguarding national preference. Chapter 5, Article 2 of the SNCF staff regulations, in the version covering 1970 to 1981, stipulates the 'General conditions for admission to the permanent service' in the following terms: 'To be admitted to a permanent position, all candidates must: a) *be French citizens or naturalized French citizens.*'[21]

English-language literature generally views racism in France through the lens of 'colour-blindness', a concept made popular in Europe by the work of Erik Bleich and Mathias Möschel, and in the United States by the seminal article by Neil Gotanda.[22] In France, the concept of 'colour-blindness' refers to the refusal to acknowledge racism or racial minorities in France. Although it is a helpful tool for understanding a number of issues, the concept needs to be further refined and developed. Racial discrimination in France is generally the result of 'hidden' administrative practices.[23] It is therefore impossible to study the effects of racial discrimination in an ahistorical manner – which is why it is crucial to highlight its social and legal depth.

[21] Emphasis added.

[22] N. Gotanda, 'A Critique of "Our Constitution is Color-Blind"' (1991) 44 *Stanford Law Review* No. 1 1; E. Bleich, *Race Politics in Britain and France: Ideas and Policymaking since the 1960s* (Cambridge: Cambridge University Press, 2003); M. Möschel, *Law, Lawyers and Race: Critical Race Theory from the US to Europe* (Oxfordshire: Routledge, 2014).

[23] A. Hajjat, 'Des discours républicains aveugles à la race? La question raciale entre texte public et texte caché' (2021) 12 *Sociologie* 419.

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The rationale for exclusion is generally to be found in the recesses of legal subcategories that establish a precarious status, backed by administrative practices that provide opportunities for discriminatory treatment. The sociologist Abdelmalek Sayad is arguably among those who put it best:

> *De jure* discrimination (between nationals and non-nationals) is reinforced by *de facto* discrimination (in the form of social, economic and cultural inequalities), which in turn finds justification and legitimacy in *de jure* discrimination: this circular reasoning in which *de jure* and *de facto* circumstances mutually support each other lies at the root of all segregation (slavery, apartheid, colonization, immigration, etc.) and all forms of domination (of slaves, black people, colonized peoples, immigrants, women, etc.) that give rise to racism, where *de jure* equality is denied on the pretext of *de facto* inequality and *de facto* equality is in turn impossible due to *de jure* inequality.[24]

In the case of Moroccan workers at the SNCF, at the heart of such exclusion as described by Sayad lies the nationality clause. This chapter shows how long-standing racial and socio-professional hierarchies have crystallized behind the interpretation of this clause, and how the clause has managed to coexist with the development of EU primary and secondary law aimed at protecting against discrimination.

Based on an analysis of this clause, I show how, firstly, in the case of Moroccan workers at the SNCF, the confusion between the enjoyment of social rights and railway worker status contributes to the production of racial otherness. Secondly, I revisit the sedimentation of interpretations leading to workers originating from the former colonies being excluded from the so-called nationality clause.

5.2 THE PROCESS OF DISCRIMINATING AGAINST MOROCCAN WORKERS AND ITS COEXISTENCE WITH NATIONAL AND EU PROTECTION AGAINST DISCRIMINATION

In itself, the nationality clause in the SNCF statutes does not contain any racist provisions; it sets out objective criteria for access to permanent

[24] A. Sayad, *L'immigration ou les paradoxes de l'altérité* (Paris: Raisons d'Agir, 2006), p. 55. (The author's translation.)

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positions, including access to citizenship through naturalization. There is nothing in the actual wording of the nationality clause that would suggest any form of discrimination, let alone racial discrimination. So where does the problem lie? Why, as in the case of the Moroccan workers at the SNCF, do we recognize the discriminatory nature of the nationality clause?

And on what basis were those responsible for enforcing the nationality clause able to deny the Moroccan workers the social rights associated with employee status when they were doing equivalent work? To gain a better understanding of this, we shall begin by examining the full legal scope of the nationality clause. As we have seen, it sets out a number of apparently neutral criteria for access to legal status as a railway worker (including acquiring French citizenship). This raises a key question: what was to be done with immigrant workers who performed tasks similar to those of permanent staff, but whose nationality prevented them from acquiring permanent status? After all, some Moroccan workers performed jobs that were supposed to be done by permanent staff. This raises the question of the principle of '*equal pay for equal work*' recognized by the French Court of Cassation, which stipulates that workers performing identical tasks are to be treated in the same way.[25] In the French legal system, there is at least one legal instrument that is supposed to make up for the lack of legislation requiring immigrant workers to be treated in the same way as permanent employees. Article 8 of the 1963 Franco-Moroccan Agreement cited above stipulates that French and Moroccan workers are to receive equal treatment. If, as everything seems to suggest, that agreement is valid, then it is entirely legitimate to consider that, in addition to permanent employee status, a similar system providing for salary and social benefits and an equivalent career advancement scale should be provided for foreign employees. In light of this, the fact that immigrant workers (Moroccans in this case) are subject to a different legal arrangement from permanent staff does not pose any major problem, provided that they enjoy the rights

[25] Cass. soc., 29 octobre 1996, No. 92-43. 680; Cass. soc., 31 octobre 2012, No. 11-20. 986. It is worth noting that this principle, derived from the ILO Equal Remuneration Convention, (C100) now extends to the right of non-discrimination: M-T. Lanquetin, 'Discrimination' in *Répertoire Dalloz de droit du travail* (Paris: Dalloz, 2023), paras. 327–355.

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conferred on all other workers, which are guaranteed by a number of international and national agreements in French law, EU law, and through international agreements.

The reality is quite different, as we can imagine. A ruling handed down by the Paris Court of Appeal on 31 January 2018 recognized the existence of discrimination on the grounds of nationality.[26] At this point in the demonstration, European readers from countries other than France may wonder how it came to be that neither the CFREU (whose Article 21 forbids discrimination on grounds of race) nor the Race Equality Directive, which implements the principle of equal treatment between persons irrespective of racial or ethnic origin, were cited in the ruling. Indeed, the ruling handed down by the Paris Court of Appeal failed to mention any of the foregoing anti-racism instruments of EU law. It only cited the violation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, pp. 16–22. However, the judges decided to set it aside, along with the violation of the Euro-Mediterranean Agreement of 26 February 1996, which entered into force on 1 March 2000,[27] even though Article 69 of the agreement provides for equal treatment of Moroccan workers. However, none of these provisions were cited by the Court of Appeal. Therefore, with regard to the treatment of Moroccan workers:

> no guarantee was initially provided to enable contract staff to move up to the 'supervisory staff' category, no provision was made to enable them to move up to the 'managerial staff' category, and, when it came to advancement to a higher position, contract staff were subject 'to the sole discretion of the company management, without any possibility of appeal'. In addition, regulatory provisions excluding the Chibani from certain positions were reinforced by practices that effectively confined them to lower-level

[26] *Cour d'appel de Paris* 31 janvier 2018, n° 15/11747. This ruling was handed down after more than 800 Moroccan workers and workers of Moroccan origin lodged a belated complaint against the SNCF.

[27] EC/Morocco Euro-Mediterranean Agreement of 26 February 1996 Establishing an Association between the European Communities and Their Member States, on the One Part, and the Kingdom of Morocco, on the Other Part. Entry into force: 1 March 2000 (OJ 2000 L 70, 18 March 2000).

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> positions. The court noted that 'at certain sites, such as Dunkirk, Le Havre and Dijon, not a single contract employee was promoted to class B. All foreign contract employees working at the Gare de Lyon had strictly identical career paths.[28]

To understand the sizeable gap between what is allowed under EU law and the way EU law is actually applied in Member States in terms of anti-racism, it is helpful to delve into France's extreme reluctance to use the term 'race', thereby neutralizing the applicability of the various provisions against racism under French and EU law.[29] As I have already demonstrated, in the French legal system, national quarrels over the use of the word 'race' neutralize the effectiveness of the various anti-racist measures. This leads to a situation in which the main international and European instruments against racism (namely the International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force on 4 January 1969, and, on the European side, Article 21 CFREU and the Race Equality Directive) are only very rarely taken into account by French judges. Although the scope of application of the Race Equality Directive's Articles 3(2) and 13 appears relevant in the case of the Moroccan workers, judges prefer not to invoke its provisions. As a result, it is as if the cardinal principle of primacy had no effective application in anti-racist matters.[30]

This reticence stems from ideological reasons expressed formally or informally through constitutional grounds pertaining to compliance with the principle of the indivisibility of the Republic (Article 1 of the Constitution). This context, which is linked to a colonial legal history in which various French governments have sought to neutralize the enforcement of provisions of international law likely to clash with their colonial policies, should be borne in mind to understand why appeal

[28] H. Belrhali, 'Les chibanis, des cheminots pas comme les autres?' (2019) *L'Actualité Juridique Droit Administratif* No. 6, 352.

[29] L. Zevounou, 'Raisonner à partir d'un concept de "race" en droit français' in L. Zevounou (ed.), *Race et droit* (Bayonne: Institut Francophone pour la Justice et la Démocratie, 2021), pp. 21–100.

[30] D. Fennelly and C. Murphy, 'Racial Discrimination and Migration Exceptions: Reconciling CERD and the Race Equality Directive' (2021) 39 *Netherlands Quarterly of Human Rights* 308–328.

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judges do not invoke EU law provisions containing the word 'race'.[31] In order to preserve a form of ideological 'consistency' in the legal system, French judges prefer to use the more neutral (and euphemistic) term 'discrimination'. In the case of Moroccan workers at the SNCF, the judges used the term discrimination on grounds of nationality even though it was clear that the discrimination was also racial in nature.

With regard to the excerpt about the Paris Court of Appeal quoted above, how can we account for the discrepancies between what the standards allowed, what they were supposed to guarantee, and the way they have been used by the people who were supposed to ensure their implementation? From a legal standpoint, it is one thing to consider that Moroccan workers cannot be granted railway worker status on the basis of the nationality clause; it is another to deduce from this that there can be no equivalent social protection for workers performing similar tasks. Confusing these two steps in the thought process amounts to implicitly conflating nationality with status as a worker. What are the implications of the nationality clause that allow it to be so construed as to deny thousands of Moroccan workers the fundamental recognition of their status as workers?

To understand how such an interpretation came to be 'self-evident', it is important to consider it in its socio-historical context, by analysing the institutionalization of the nationality clause. In other words, we must grasp the implicit meaning behind the expression: 'be French citizens or naturalized French citizens'.

To understand exactly how the nationality clause could give rise to discrimination, we need to look at the implicit meaning of the clause. Such discriminatory practices are products of socio-historical sedimentation and financial constraints which, over time, enabled the majority of competent bodies to interpret the nationality clause to mean that they (I am referring here to all workers not belonging to the permanent staff)

[31] It has been argued that both France and the United Kingdom ratified the European Convention for the Protection of Human Rights in order to avoid possible recourse by anti-colonial movements to the European Court of Human Rights: A. W. B. Simpson, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2010); P. Bonino, *La France face à la Convention européenne des droits de l'homme (1949–1981)*, PhD thesis, CY Cergy Paris University (2016).

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could not be recognized as fully fledged workers. Historically, this fringe of subordinate workers belonged to the auxiliary category in which the clause was embedded. Under such a system, being an immigrant implied much more than not enjoying the benefits associated with a certain status: being an immigrant also meant not being legally recognized as a worker at all. As far as immigrant workers from the former colonies were concerned, there is every reason to believe that the discriminatory treatment they received from the colonial authorities in their countries of origin continued in metropolitan France. Thus, the stigma attached to the implementation of an 'exceptional' labour law regime was linked to their status as workers from the former colonies.[32]

In this case, equal treatment of all workers (allowing for the introduction of differences, including differences of nationality) is replaced by the introduction of a socio-professional hierarchy (between groups of established workers and precarious workers) that opens up the possibility of multiple forms of discrimination, including racial discrimination.

Providing this historical context is crucial if we are to make sense of the fact that the SNCF – and therefore the people responsible for interpreting the nationality clause on a day-to-day basis – has remained completely silent on Article 8 of the Franco-Moroccan Agreement and on the practice of not including Moroccan workers in the catalogue of career paths.[33] This pattern of silent *contra legem* practices sheds light on the deployment of a broader system impeding the career development of Moroccan workers (through disregard for the fact that they have succeeded in professional examinations, and refusal to include

[32] T. Stovall, 'The Color Line Behind the Lines: Racial Violence in France during the Great War' (1998) 103 *The American Historical Review* 737–769; J.-P. Le Crom and M. Boninchi (eds.), *La chicotte et le pécule: les travailleurs à l'épreuve du droit colonial français (XIX^e-XX^e siècles)* (Rennes: Presses Universitaire de Rennes, 2021); H. Mulonnière, *Administrer le travail des « Nord-Africains » en métropole: contribution à la socio-histoire de l'État en contexte impérial (1926–1946)*, PhD thesis, University Paris Nanterre (2023).

[33] The catalogue of career paths defines the grades and determines the conditions for advancement and seniority in the various professions represented in the SNCF. Not including 'Moroccans' or immigrant workers, even though they sometimes performed tasks identical to those of their counterparts belonging to the permanent staff, was tantamount to sounding the death knell for their careers: they had no prospects of career advancement and no formal proof of their seniority.

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contract workers on promotion lists and tables, to name but a few).[34] The most telling example was when the acquisition of French nationality by certain Moroccan workers did absolutely nothing to change their career paths. Evidence submitted to the Court of Appeal reported the following: '[…] out of 82 employees, 52 acquired French nationality during their career, but only 16 benefited from permanent status, while the SNCF refused to grant permanent status to the remaining 36 […] due to their age'.[35]

Ultimately – and this is the second step in the argument – it seems as if the common sense associated with the nationality clause as understood by the SNCF failed to apply to certain socio-professional groups (in this case, immigrant workers). This doubtless explains why, despite the naturalization of some Moroccan workers, the majority were denied access to permanent employment on the basis of another criterion: age. Age was used as a pretext to conceal the stigma attached to the broader exclusion of immigrant workers from the former colonies. Trapped in a legal system that denied them any prospects of career advancement, Moroccan workers (and immigrants in general) were seen by the SNCF as a homogeneous ethno-racial group excluded from the national identity (they remained 'immigrants' even when they were French). In this context, the term 'immigrant' was used in opposition to the majority identity (nationals).[36] This classification of Moroccan workers as members of

[34] This is not a value judgement but rather an acknowledgement of the clear contradiction between the provisions of the Franco-Moroccan Agreement and the way it was interpreted by those responsible for its implementation.

[35] Submissions at the hearing of 26 June 2013 (Mr Z, a lawyer representing the Moroccan workers): 'The SNCF argues against Mr X that: "You were born on 1 January 1949 and obtained French nationality on 25 April 1994, at the age of 45 years and 3 months. Your application to join our permanent staff, submitted on 13 September 1994, was refused […] because you had already reached the age limit of 45 at the time of your naturalization and, as a result, you no longer fulfilled one of the conditions stipulated in our regulations. These conditions are subject to the approval of the Ministry, and it is therefore impossible for us to waive them."' Yet the SNCF was able to waive the age criterion, particularly after the Second World War and in 1982 under Minister Fiterman, in order to grant permanent status to former auxiliary staff.

[36] To borrow an expression used by Colette Guillaumin in her definition of racism, where she shows that racism is based on a 'sign', i.e. a generic mark that classifies and distinguishes a majority group: C. Guillaumin, *L'idéologie raciste* (Paris: Folio Essais, 2002), pp. 106–111.

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their 'racial' group precluded any possibility of recognizing their merits or allowing them to advance in their careers.

The accumulation of practices assigning the identity of immigrants (and therefore inferior workers) to 'Moroccans' contributed to the institutionalization of a glass ceiling on the basis of the nationality clause. In this situation, the relationship between equality and race is a complex one. In theory at least, the nationality clause in no way precludes a differential and parallel treatment of immigrant workers that would be equivalent to that of permanent staff. However, behind the unspoken implications of this apparently egalitarian proclamation, a system was created whereby certain workers were classified as immigrants, despite their efforts to break free from that classification. This has prompted me to examine the sedimentation of interpretations of the nationality clause that have culminated in institutionalized discrimination.

5.3 THE FINANCIAL ARGUMENT

Placed in their socio-historical context, the inequalities generated by the SNCF's internal 'normative' system were neither a random occurrence nor the result of mere negligence. This system, which was carefully orchestrated by the public corporation and the state apparatus, created a questionable legal status on the fringe of legality: namely, that of auxiliary workers. The state (the Ministries of Transport, Budget, and Social Affairs) supported, albeit implicitly, the continuing existence of an auxiliary status, which in practice restricted the career development opportunities of Moroccan workers. One of the decisive pieces of evidence is an excerpt from the minutes of a meeting of a joint statutory committee (on which the minister of transport had a statutory seat) held in 2006. When asked about the possibility of abolishing the nationality clause, SNCF management stated:

> Although recruitment has been opened up to nationals of EU Member States, the SNCF has only hired 200 foreign staff members, a small number compared to the total number of recruits, which can be explained by the lack of interest shown by candidates from other countries. Furthermore, the inclusion of current foreign SNCF contract workers in the permanent staffing structure, which would result from the abolition of the nationality

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> clause, would generate an additional annual expense of 70 million euros for the company, which is approximately the amount of an annual wage negotiation. The financial burden on the SNCF would therefore be too high.[37]

Clearly, the financial argument has superseded the nationality argument. Initially, the SNCF statutes made the granting of railway worker status – and the associated social benefits – conditional on the acquisition of French nationality. A number of Moroccan auxiliary staff became French nationals at the end of the 1980s, but the SNCF imposed an age limit on them. Then, when jobs that had been closed to foreigners were opened up to EU nationals at the end of the 1990s, the SNCF used a financial argument to prevent them from being granted railway worker status. As a result, while EU and non-EU nationals were equally discriminated against, only EU nationals enjoyed the benefits associated with railway worker status. Although Moroccan workers were more numerous, they were excluded on the basis of a financial rationale aimed at dividing the European and Moroccan workforce.

The excerpt quoted above, which was a decisive factor in the ruling handed down by the Paris Court of Appeal on 31 January 2018, sounds somewhat self-incriminating. It bears witness to the pre-eminence of the nationality clause, viewed as the major obstacle to the career development of Moroccan workers. Equivalent social rights, guaranteed in principle by the bilateral Franco-Moroccan Agreement of 1963, are not even mentioned.

It is difficult to believe that recruitment procedures for Moroccan workers were organized haphazardly; this is all the less likely in light of the historical precedents involving internal migration on a similar scale between France and its former colonies.[38] The signing of the bilateral

[37] Excerpt from the minutes of the joint committee tasked with drawing up the status of collective labour relations between the SNCF and its staff, minutes of the 1,025th meeting held on 30 January 2006, p. 7.

[38] These include Réunion (where 2,150 minor children were distributed across mainland France) and the French Caribbean islands of Martinique and Guadeloupe through the BUMIDOM, the state office that organized flows of migrant workers to France in the 1960s and 1970s: G. Ascaride, C. Spagnoli and P. Vitale, *Tristes tropiques de la Creuse* (Troyes: Editions KA, 2004); I. Jablonka, *Enfants en exil. Transfert de pupilles réunionnais en métropole (1963–1982)* (Paris: Editions du Seuil, 2007); W. Bertile, P. Eve and G. Gauvin, et al., *Les enfants de la Creuse. Idées reçues sur la transplantation de mineurs de la Réunion en France* (Paris: Cavalier Bleu, 2011).

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agreement between France and Morocco coincided with the emergence of a new administrative structure governing labour from the former colonies.[39] Previously referred to as 'indigenous' workers, who enjoyed a relative ease of movement, after independence this workforce became known as 'immigrant' workers, subject to stricter administrative control. Without taking at face value the asymmetry described by Abdelmalek Sayad between dominated and dominant countries (generally former French colonies) in migration studies, it is impossible to ignore the post-colonial dimension of labour flows between France and Morocco.[40]

5.4 RACIAL DISCRIMINATION EXACERBATED BY A DIVISION BETWEEN EUROPEAN AND MOROCCAN EMPLOYEES

In a number of rulings, the Court of Justice of the European Union has confirmed that certain jobs previously reserved for nationals are now open to nationals of EU Member States (Article 45 of the Treaty on the Functioning of the European Union). Accordingly, at the end of the 1990s, the SNCF opened up access to railway worker status to EU nationals. For non-EU nationals, access was not on the agenda, even though certain political and civil society players were pressing for it. Thus, the divide that existed between French and non-French nationals was replaced by a divide between Europeans and non-Europeans. Discrimination persisted, however, insofar as the acquisition of a European nationality entitled people to rights and social benefits that were denied to other workers doing similar jobs (in terms of pensions, access to healthcare, etc.). In theory, the provisions of the Race Equality Directive Article 1 apply: 'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'

In light of the Race Equality Directive, the discrimination suffered by Moroccan auxiliary workers is both direct and indirect. It is direct in the sense that it creates less favourable conditions on the basis of ethnic origin; but it is also indirect in the sense that the apparently neutral criterion put

[39] S. Laurens, *Une politisation feutrée. Les hauts fonctionnaires et l'immigration en France* (Paris: Belin Littérature et Revues, 2009).

[40] Sayad, *L'immigration ou les paradoxes de l'altérité*, pp. 259–288.

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forward by the SNCF (as regards enjoyment of nationality) denies access to a number of social rights from which Moroccan workers are supposed to benefit. Admittedly, it could be argued that Article 3(2) of the directive applies: 'This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.' In the case of the SNCF's Moroccan workers, the difference in treatment applied by the SNCF on the basis of nationality is not in itself a problem in absolute terms. Instead, what is problematic and what makes it classifiable as indirect discrimination lies, under the terms of the directive, in the inseparable link between the enjoyment of railway worker status (under the nationality clause) and the associated social rights, which are supposed to be extended to all workers performing identical tasks, regardless of their nationality. In other words, the point is not to call into question a difference in treatment based on nationality so much as the consequences of such a difference in treatment, which in practice produce situations of exclusion based on race, via the nationality criterion. However, legal reasoning alone cannot explain the failure to enforce the Race Equality Directive in this case. To understand why it has not been implemented, it is vital to consider the historical dimension.[41]

The auxiliary category can be better understood by looking back at its historical origins. Its creation is closely linked to the history of the railways and the world of the working class in the nineteenth century and, in particular, to the historical status of the rail labourer, a working-class figure who hung around the tracks waiting to be hired on various terms: hourly, weekly or, at best, monthly. The status of permanent or 'commissioned' staff was obtained through determined social struggle; however, – and this is less widely known – the gains resulting from this improvement did not benefit all railway workers.[42] To put it in Robert Castel's terms, obtaining status

[41] Regarding the historical dimension of the continuity of certain forms of discrimination, I also refer the reader to the chapters by D. Ashiagbor and K. Fertikh in this volume (Chapters 6 and 4 respectively).

[42] It is impossible to discuss the general history of the condition of railway workers in detail in the scope of this article. However, the reader can refer to the following sources (in

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was the historical culmination of the contract of service. Paradoxically, the historical process took auxiliaries from a vulnerable status to one of social non-existence, a form of *disaffiliation*.[43] Auxiliaries hired out their labour in return for a wage. They could be dismissed at any time and remained dependent on the economic fortunes of the concession companies and subsequently the state-owned corporation; they were treated in a comparable way to domestic servants. For a long time, promotions were awarded 'on merit', until the forerunner of what would come to be known as 'permanent staff' status appeared in 1912 at the Compagnie des chemins de fer de l'État (State Railway Company). This change in employment categories followed the historic strikes of 1910, motivated by deplorable health and working conditions.[44] From the standpoint of nineteenth-century legal doctrine, it was a contractual relationship rather than a protected status, in the sense that an auxiliary was merely a 'commodity'.[45] They hired out their labour (and hence their bodies) in return for a meagre salary. They were subject to the same discipline as railway workers, even though they did not enjoy any of the social benefits associated with the latter status; to take one example, they could be dismissed at any time. The auxiliary system was a direct descendant of the legal forms of salaried employment of the early nineteenth century (contracts for works and services under Articles 1780 and following of the Civil Code).[46] Immigrant workers (or their nineteenth-century equivalents) were never in a position to influence the course of their legal destiny. The study of Moroccan workers highlights a singularity: their situation was linked to their non-national

French): G. Chaumel, *Les Cheminots. Histoire des ouvriers et employés de chemins de fer en France* (Paris: Librairie Marcel Rivière et Cie, 1945); J. Maurice, *Le charbon et l'escarbille : genèse et histoire du statut du personnel cheminot, de la seconde moitié du XIX^e siècle à la veille de la Seconde Guerre mondiale*, PhD thesis, Sorbonne Université (2019).

[43] R. Castel, *Les métamorphoses de la question sociale. Une chronique du salariat* (Paris: Fayard, 1995), p. 14.

[44] Les Cahiers de l'Institut, Processus historique relatif à la représentation du personnel et au droit syndical dans les Chemins de fer, 3^e trimestre, 2015, n° 54, pp. 18–20; C. Chevandier, *Cheminots en grève ou la Construction d'une identité* (Paris: Maisonneuve & Larose, 2002); and Maurice, *Le charbon et l'escarbille*, pp. 184–355.

[45] A. Supiot, *Critique du droit du travail* (Paris: Presses Universitaire de France, 2015), pp. 45–66.

[46] But also of the new-found awareness of pauperism and the birth of the industrial proletariat: Castel, *Les métamorphoses de la question sociale*, pp. 218–245.

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status, which generated forms of exclusion and stagnation in their career progression. Thus, the consequences of the discrimination suffered by Moroccan workers have their roots in France's colonial history and, more specifically, in the treatment of indigenous labour in metropolitan France.

The railway archives bear witness to this state of affairs. Prior to the 1937 collective agreement, the state railways agreement signed in 1920 foreshadowed in many respects what would become the nationality clause, specifying that the criterion of being a French citizen or naturalized French citizen does not apply to employees working on parts of the rail system located outside national territory.[47] It may only be waived on the said territory in exceptional circumstances.[48] The legal doctrine at the time was entirely consistent with this view. With regard to the criterion of employee nationality, one author states:

> a difficulty arises, however, in the case of Tunisian or Algerian candidates whose nationality is governed by the decrees of 24 October 1870 and 7 October 1871, and the laws of 4 February 1919 and 20 December 1923. The words 'be French citizens or naturalized French citizens' should be construed as meaning that they must be French nationals, which excludes certain natives of our colonies who are merely French subjects.[49]

This interpretation is in line with previous practices and legislation: company archives contain registers of foreign auxiliaries kept by the Ministry of Public Works as far back as 1898. After 1870, companies were required to justify the hiring of foreign workers.[50]

The nationality clause was originally justified by a combination of xenophobia and the government's commitment to security with regard to recruitment in the railway sector. Faced with competition from their

[47] The state-owned rail network was created by the Act of 13 July 1911, which incorporated the western network into the state-owned network. A ministerial order of 23 December 1911 defined the network's staff regulations, leading to the creation of commissioned staff, the forerunner of permanent staff.

[48] SNCF archives at SARDO, Le Mans, 726LM703.

[49] G. Aubert, *Étude sur le statut du personnel des compagnies de chemins de fer* (Paris: Rousseau, 1926), p. 71.

[50] Archives Nationales du Monde du Travail (ANMT) Lille 48 AQ 3379 Liasse 8 (a legal note dated 22 February 1917 from the War Ministry, on admission of foreigners as auxiliary or temporary employees on French lines).

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Belgian, Swiss, and English counterparts, French railway workers, particularly in the northern part of the country, demanded stronger protectionist measures during the economic crisis of 1873. The French government, for its part, used the defeat of Sedan as a pretext to tighten its control over the activities of foreign workers in a sector that was viewed as strategic at the time. In 1898, the Compagnie du Nord (Northern Company) was called upon to justify to the minister of public works the recruitment of several foreigners (but also women), which it did in the following terms:

> The 152 Belgians joined the Company before 1885; several are in the process of being naturalized; five others have been granted resident status. They all hold menial jobs as crewmen, surveyors, labourers and the like, mainly in the area adjacent to the Belgian border. Only one is a draughtsman in Paris; he has been with the Company since 1872. Eight Italians joined the Company prior to 1882; a ninth joined in 1888; all of them are manual labourers, and one is in the process of being naturalized. One of the three Swiss is a draughtsman in Paris and has been with the Company since 1878; the other two are joiners and surveyors. The others include four Russian workers who joined the Company before 1889; one Spanish worker who joined in 1873 and is awaiting naturalization; one Dutch roadmaster who joined in 1867; and one Monegasque driver who joined in 1876 and is awaiting naturalization.[51]

The nationality criterion in recruitment was therefore built on a negative image of the foreigner. It was implicitly accepted that foreigners could not hold important functions in the companies; they were assigned to subordinate roles and, very exceptionally, to managerial positions. In the same vein, indigenous workers were denied their social rights in 1917 (starting with access to the pension scheme), even when they worked as auxiliaries in the companies.[52] This double boundary (excluding both foreigners and indigenous people from the permanent staff) internalized a form of colonial heritage. In fact, the distinction between nationals and foreigners also reintroduced the distinction between nationals and indigenous people. Hence, racial otherness became embedded in the contours of nationality.

[51] ANMT 48 AQ 3379 Liasse 8.
[52] ANMT 48 AQ 3379 Liasse 8.

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Although they performed the same duties as other railway workers, the 'Moroccans' were never really recognized as railway workers in their own right, as the reference to nationality created exclusion and racialization.[53] The contours of these invisible social boundaries were drawn by legal and administrative categories. Norbert Elias' analysis of the distinction between 'established' and 'marginal' categories helps us to understand more precisely the distinction between auxiliaries and permanent staff (among railway workers).[54] The exclusion of immigrant workers or workers of immigrant origin was founded on legal standards that were themselves based on debatable criteria (age, nationality, lack of qualifications, suspicions of incompetence, etc.). What we have here is a differentialist type of racism, which does not use the word race:[55] Moroccan auxiliaries were never quite considered railway workers and, even when they were naturalized, they were still not really railway workers, as their years of service as auxiliaries were not counted towards their seniority.[56]

5.5 CONCLUSION

The system that generated the discrimination suffered by Moroccan workers was fuelled by a two-fold rationale, at once economic (including immigrants in the permanent staff would be too costly) and legal/administrative (excluding immigrants but expecting them to perform the same tasks as nationals). The combination of these two rationales has contributed to the fragmentation of the auxiliary workforce (housekeepers, immigrants, precarious nationals). Backed by the authority of legal standards and administrative practices, this system created multiple

[53] Understood here as the process of classifying a dominated group (immigrant workers) by means of the discriminatory use of the nationality criterion by the dominant group: E. Balibar, 'Racism and Nationalism' in E. Balibar and E. Wallerstein (eds.), *Race, Nation, Class: Ambiguous Identities* (New York: Verso Books, 1991), pp. 37–67.

[54] N. Elias, *Logiques de l'exclusion* (New York: Pocket, 2002).

[55] E. Balibar, 'La construction du racisme' in *Actuel Marx* vol. 38 (Paris: Presses Universitaire de France, 2005), p. 11.

[56] Emmanuelle Saada points out that the divide between nationality and citizenship continues to exist in various forms: E. Saada, 'Nationalité et citoyenneté en situation coloniale et post-coloniale' (2017) 160 *Pouvoirs: Revue d'Etudes Constitutionnelles et Politiques* 113–124.

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hierarchies pitting various categories of workers, sometimes performing the same tasks, against each other. Based on an economic analysis of the law, the dynamics of this system can be summed up as follows: 'how to maximize the (economic) "benefits" of immigration while minimizing the "costs" (particularly the social and cultural costs) incurred by the presence of immigrants'.[57] Here, race combines with class and gender, in the sense that the auxiliary status of immigrants cannot be dissociated from their temporary, and therefore economically interchangeable, nature.[58]

Examining the nationality clause and how EU law has not meaningfully remedied these practices is a good starting point for understanding one of the singularities of racism in France and perhaps in Europe. Behind the apparent neutrality of the nationality clause, the archetype *par excellence* of social rights-holders emerged in France in 1870 within the railway working class. In France, a 'national' was a French (white) male worker. In actuality, the reference to the national coincided with the signifier of the dominant group.[59] The case of the Moroccans working for the SNCF once again illustrates the relevance of a perspective based on the concept of racial capitalism, understood here as the possibility of a capitalist system whose working-class fragmentation was also the result of a broader process of racialization.[60] In this sense, the analysis of the treatment of migration in relation to Europe's colonial heritage would be worth exploring beyond France's borders. This book is undoubtedly a forerunner to future studies on a European scale.

[57] A. Sayad, *L'immigration ou les paradoxes de l'altérité*, p. 42.

[58] Along with immigrants, women (housekeepers, cleaners, and social services employees) in precarious jobs were the last to be integrated into the permanent staff. A great deal of research remains to be done on this subject, which has ties to feminist materialism.

[59] I use this term in the sense used by C. Guillaumin as a criterion of exclusion linking the biological to the social (in this case the Nation) – both reified and generalized – allowing the majority group to distinguish itself from the minority groups: Guillaumin, *L'idéologie raciste*, pp. 93–98.

[60] A partial list of studies on the subject: J. O. Calmore, 'Exploring the Significance of Race and Class Representing the Black Poor' (1982) 61 *Oregon Law Review* 201; C. Robinson, *Black Marxism. The Making of Black Radical Tradition* (Chapel Hill: The University of North Carolina Press, 2020); D. Ashiagbor, 'Race and Colonialism in the Construction of Labor Markets and Precarity' (2021) 50 *Industrial Law Journal* 506; M. Haley Davis, *Markets of Civilization. Islam and Racial Capitalism in Algeria* (Durham: Duke University Press, 2022).

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