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INTERNATIONAL MIGRATION AND LABOUR: FOREIGN WORKERS IN CÔTE D'IVOIRE

RÉSUMÉ

Grâce à la situation de plein emploi que la Côte d'Ivoire a connu depuis l'époque coloniale et la politique d'ouverture du Président Félix Houphouët-Boigny pour qui ce qui unit les travailleurs, à savoir l'humanité, passe devant ce qui les distingue, notamment leur différence de nationalité, le travail de l'étranger n'a jamais été un problème. Il en est devenu un avec la crise économique qui a fait son apparition dans les années 1970.

MOTS CLÉS: *Migrations, travail, égalité, discrimination, différence.*

ABSTRACT

Thanks to the full-employment situation in Côte d'Ivoire after the colonial era and the political openness of President Félix Houphouët-Boigny, for whom what united workers (namely their humanity) was more important than what separated them, in particular their various nationalities, foreign labour was never an issue in the country. It became one, however, with the economic crises that emerged in the 1970s.

KEYWORDS: *Migration, Labour, Equality, Discrimination, Difference.*

The current situation in Côte d'Ivoire shows that the issue of international migration, and in particular the status of foreigners in the labour system, is now being stirred up again, with proliferating discussions on the subject of «Ivoryity»¹. There are at least three possible explanations for this inward turn: a lack of familiarity with the foreign other, fear of unemployment² and alleged security problems.

Is this an accurate picture of the situation of foreign persons? And what foreign persons are we talking about exactly? These are important questions, because although the Labour Code uses this term, it fails to define it. The Labour Code refers, rather, to the Law on the Entry and Residence of Foreign Persons in Côte d'Ivoire, which specifically describes the notion³. Article 1 of that law provides as follows: «Within the meaning of the present law, foreigners are considered to include all individuals lacking Ivorian nationality, whether they hold a foreign nationality or no nationality at all»⁴. Article 1 of the 1954 Convention on the Status of Stateless Persons defines a stateless person as «a person who is not considered as a national by any State under the operation of its law». Therefore, all non-nationals and stateless persons are considered foreigners. Though they do not specifically use the term

- 1 We are referring here to the current controversy in the government, which issued a warning to President Henri Konan BEDIE for making remarks likely to incite hatred of foreigners. On 5 June 2019, while receiving a delegation from his party, PDCI RDA, former President BEDIE seized upon the intercommunal conflict of 20 May 2019 in Béoumi between the indigenous Baoulé and Malinke ethnic groups (a conflict that resulted in 11 deaths, 108 injured persons, 300 displaced persons, and caused significant material damage), stating: «First we let the foreigners into our coffee and cocoa plantations, and then they started settling there on their own; today they are attacking Ivorian planters and even fighting for land ownership. We must react to ensure that Ivorians are not made foreigners in their own homeland - because what that's what we're doing right now, making Ivorians foreigners in their own homeland. And that is something Ivorians will never accept».
- 2 N. Ferré and S. Nadal, «Traitement des travailleurs en France: regards critiques», in *Mélanges A. Lyon-Caen*, Dalloz, 2018, p. 348: «The removal of those without authorisation to participate in the labour market would resolve the problems of the others, who were suffering from unemployment».
- 3 Law no. 2015-532 of 20 July 2015 establishing the Labour Code, JORCI, no. 74 of 14 October 2015, p.1211; Article 26.8 para. 1: «The provisions of this Chapter (Chapter 6 of the Labour Code on the travel and transport of employees between their habitual residence and workplace) shall not constitute an obstacle to the application of regulations concerning the conditions for the admission and residence of foreigners».
- 4 Law no. 90-437 of 29 May 1990 on the Entry and Residence of Foreigners in Côte d'Ivoire, JORCI, 9 August 1990, p. 262.

«foreigner», other provisions of the Labour Code⁵ and implementing laws⁶ allude to it. The notion of a foreigner as used in this study must thus be distinguished from the distorted use of the term to refer to a person of Ivorian nationality who has left his or her native city or region to settle in another region of Côte d'Ivoire⁷. Presented this way, the study is thus of definite interest, as it permits us to broach the question of professional migration. A foreign person's greatest aspiration in his or her host country is to enjoy equal treatment with nationals. But how is it possible to conceive of equality among people who do not share the same nationality? Doesn't the difference in nationality make equal treatment unthinkable? The Constitution is not very clear on the issue, insofar as nationality is not included among the prohibited grounds of discrimination in employment given in Article 14⁸. A comparative study of various legal systems⁹ shows that the subject is of interest to all democratic states concerned with respect for the fundamental rights of individuals, insofar as foreigners are often less well-treated than nationals in all countries. That is why in times of crisis, they are the first to be dismissed from their jobs¹⁰. Yet, even acknowledging this fact, Côte d'Ivoire has still not ratified the ILO Convention on Migrant Workers. This study is an opportunity to address all these difficulties, both theoretical and practical.

The fundamental question we must ask here is whether foreigners receive the same treatment as Ivorians under labour law.

To answer this question, we must look back to the history of foreign workers in Côte d'Ivoire. Though its origins are the same as other French-speaking African countries, Ivorian labour law did not take the same approach. Although the country is endowed with arable land, Côte d'Ivoire has had a shortage of manpower to cultivate it since the colonial

5 Article 2 of the Labour Code, however, does make nationality a prohibited ground of discrimination.

6 See, in particular, articles 7 and 9 of decree no. 96-287 of 3 April 1996 on employment contracts, which use the expression «worker of another nationality» instead of the term «foreigner».

7 Precision is important here, because of the unfortunate tendency of some Ivorians, considering themselves «more Ivorian than others», instead of using the legal criterion of nationality to determine who is a foreigner, to consider other Ivorians foreigners - especially Malinké people - for the sole reason that they often tend to have the same surnames as nationals of border countries such as Guinea, Mali, or Burkina Faso. This concept of what makes a person a foreigner is one of the causes of the crisis Côte d'Ivoire has gone through, and underlies tensions currently present in several regions of Côte d'Ivoire.

8 Law no. 2016-886 of 8 November 2016 on the Constitution of the Republic of Côte d'Ivoire, JORCI, no. 16, special issue of 9 November 2016, p. 131: «Everyone has the right to freely choose his profession or job. All persons shall have equal access to public and private employment based on their qualifications and skills. Discrimination in access to employment or in professional practice based on sex, ethnicity, or political, religious or philosophical opinion is prohibited».

9 One may refer in this regard to the experience of the member countries of the European Union, where this issue has been discussed for some 30 years; see A. Lyon-Caen, «La libre circulation des travailleurs dans la Communauté économique européenne», *Droit Social*, 1989, p. 526.

10 CSCJ, 22 May 2014, ruling no. 360/14 unpublished. In terminating the employment contract of an employee of foreign nationality in the context of a dismissal on economic grounds, the employer, justifying the disputed dismissal, stated: «The duties assigned to particularly high-paid positions currently occupied by expatriate executives will now be assigned to local executives». In light of this assertion, the employee of foreign nationality considered that he had been the victim of discrimination based on his nationality, and the lower courts agreed. The Supreme Court did not however agree with the lower courts.

period¹¹. Moreover, this was the fundamental reason why the colony of Upper Volta (now Burkina Faso) was attached to the colony of Côte d'Ivoire between 1937 and 1942¹². This situation favouring the immigration of foreigners into Côte d'Ivoire was encouraged by a very liberal policy adopted by F. Houphouët-Boigny, first as Member of Parliament and Minister for Overseas France, and then in 1960 as President of the Republic of Côte d'Ivoire.

In colonial times, the term «foreigner» did not have the same meaning as it does today. In view of the treatment given to all indigenous peoples in the labour system, F. Houphouët-Boigny¹³ and his comrades in arms¹⁴ did not see Malians, Senegalese or Beninese as foreigners. Rather, the notion referred to French or European citizens, who were not subject to local law and thus enjoyed an enviable difference of treatment. The abolition of forced labour, for which F. Houphouët-Boigny was the leading advocate¹⁵, and the adoption of the Overseas Territories Labour Code of 1952¹⁶ count among the two great victories of this fight for workers' equality.

Rooted as it was in the decolonisation struggle, the equality studied here was never part of an independent project for the development of legal norms, but was always bound up with the general struggle for equality among human beings. For F. Houphouët-Boigny, the relevant criterion for defining the rights of foreigners was not their nationality but their

11 K. Brou and Y. Charbit, «La politique migratoire de la Côte d'Ivoire», *Revue européenne de migrations internationales*, vol. 10, no. 3, CERPA CERPOD ORSTOM-Migrations africaines, 1994, p. 33.

12 On the suppression of the colony of Upper Volta, see the Decree of 5 September 1932 abolishing the Colony of Upper Volta and dividing its territory between the Colonies of Niger, French Sudan and Côte d'Ivoire, JOAOF, 15 October, p. 902. On the re-establishment of the colony of Upper Volta, see Law no. 47-1707 of 4 September 1947 restoring the Territory of Upper Volta, JOAOF, 27 September 1947. See also «Pétition des peuples voltaïques à Monsieur le Ministre de la France d'Outre-mer en vue de la renaissance de la Haute Volta dans les limites premières», in AS Balima (dir.), *Genèse de la Haute Volta*, Paris, Presses Africaines, 1970, p. 164.

13 F. Houphouët-Boigny: «We demand that you immediately give us equality under labour law, equal social security benefits, and equality in family allowances - in short, equal standards of living (...). To achieve this goal, the entire French population here will need to agree to a 25 to 30 per cent reduction in their standard of living for the benefit of our fellow citizens in the Overseas Territories». Quoted by F. Cooper, «Empire, nation et citoyenneté: la France et l'Afrique», 33rd Marc-Bloch Conference, 7 June 2011: https://www.ehess.fr/sites/default/files/pagedebase/.../2011_conference_marc_bloch.pdf, p. 8.

14 «Africans, like all people living in overseas territories, have a very strong feeling that they belong to a community, a country, a "local region" of Senegal, Sudan, Dahomey, Chad, Gabon, etc. that is part of the French Republic, but is distinguished from other members of the French community by its geographical, historical and human uniqueness, and by the economic, psychological and religious conditions of life there».

15 Law no. 46-645 of 11 April 1946 banning forced labour in the Overseas Territories.

16 Law no. 52-1322 of 15 December 1952 establishing the Labour Code for Overseas Territories, JORF, no. 298, p. 11541.

«humanity»¹⁷. He thus proceeded to recruit large numbers of foreign persons to the High Administration¹⁸ for the construction of the Ivorian nation.

Ivorian labour law bears the imprint of this foundational desire to ensure that foreign persons should be treated as equal to Ivorians. But everything changed with the economic crisis of the 1970s. At that time, a policy that was unfavourable to labour immigration was adopted, with the creation of the so-called Ministry of the «ivorisation of jobs»¹⁹. The new system, which limited the employment of foreign persons, was supplemented by various regulatory provisions²⁰ which were finally brought together in 2015 in formal legislation promoting a «preference for nationals» in employment²¹.

Due to the colonial history of unequal treatment of indigenous workers, Côte d'Ivoire at its origins chose to assimilate foreign persons, promising them equal treatment and identical working conditions to those enjoyed by Ivorians **(I)**. But with the economic crisis and its corollary - job scarcity - foreigners are no longer welcome **(II)**.

I - THE PROMISE OF EQUAL TREATMENT OF FOREIGNERS

When the desire to establish equal treatment between Ivorian and foreign employees was expressly manifest, the question arose of how to formulate the expression of that equality **(A)**. In order to avoid reproducing the errors made in the past based on the use of differing categories, lawmakers have established certain guarantees to ensure that the equality proclaimed is not a mere illusion **(B)**.

A - THE WORDING OF THE PROMISE

In their formulation of the notion of equality, lawmakers favoured two approaches to the concept, inspired by the scholarly reflections of Aristote²²: indifference to differences in nationality on the one hand, and on the other, consideration of differences in nationality when necessary.

17 F. Houphouët-Boigny, cited by F. Cooper, *op. cit.*, p. 23: «What we are doing in Côte d'Ivoire to help our brothers is to welcome them here. And we will welcome them with an African-style humanism, one imbued with true brotherhood and true solidarity».

18 «In our governments we have had ministers from various friendly but foreign African countries. We have foreign prefects. We have foreign ambassadors. We have foreign department heads. And in everyday life we have rural people from other African territories, who have the same rights as Ivorians and participate in building the nation».

19 Decree no. 78-875 of 13 October 1978 establishing the structure of the Ministry of Labour and Ivorisation of Executives, and reorganizing said Ministry, JORCI of 9 November 1978, p. 2234.

20 Order no. 6421 of 15 June 2004 amending Order no. 1437 of 19 February 2004 regulating hiring and visa costs for the employment contracts of non-Ivorian personnel, JORCI no. 29 of 15 July 2004, p. 241.

21 See Article 11.1 of Law no. 2015-532 of 20 July 2015 establishing the Labour Code, JORCI, no. 74 of 14 July 2015, p. 1198, which required employers seeking to hire foreigners to provide proof that they were unable to find an Ivorian capable of occupying the position. On this issue, see N. Yéo, «La préférence nationale en droit ivoirien du travail», *Revue Ivoirienne des Sciences Juridiques et Politiques*, 2016, no. 4, p. 52.

22 Aristote, *Éthique à Nicomaque*, Paris, Flammarion, 1992, V, III, p. 142.

Indifference to the different nationalities of employees began during the colonial era, with the advent of a labour law with a human face. Symbolic of this development was the law of 15 December 1952 establishing the Labour Code for Overseas Territories. This law gave substance to the principles of the right to work, as enshrined in the Houphouët-Boigny law, and the equality of persons, as recognised by the 1946 French Constitution. Prior to this date, a distinction was between native workers, Ivorians in particular, to whom colonial labour law was applied, and the French Labour Code which was applicable to French and other European employees. This situation was based on an application of the principle of legislative particularity²³.

This indifference toward differences in nationality was not limited to that idea of equality that H. Kelsen refers to as equality before the law, defined as the principle of the consistent application of the law in general²⁴. Lawmakers demanded that the content of the law make no distinction as to the origin of employees. Eloquent examples of this are provided by the fact that the category of «employee» was given a neutral definition²⁵ in terms of nationality and fact that rights of foreign workers were aligned with those of national workers, both in terms of working conditions and in terms of the principle «equal pay for equal work»²⁶.

Upon the attainment of independence, instead of following in the footsteps of other countries, such as Mali, which enacted rules limiting foreigners' access to remunerated employment in 1962²⁷, the nation chose to strengthen this system that it had inherited from colonial rule and which promoted equality between foreigners and Ivorians. This is

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- 23 The principle of legislative particularity established the application of different legislation in the colonies and in France, providing that the colonies would be governed by special laws or regulations. The first formulation of the principle of legislative particularity was provided in article 91 of the Constitution of 22 Frimaire, Year VIII, which stated that «The form of government in the French colonies shall be determined by special laws». This was regularly reiterated by other dispositions until the eve of Independence in 1958 (Article 73 of the French Constitution of 4 October 1958). For a more precise idea of the principle of the legislative specialty, see S. Boni, «Le droit de propriété foncière rurale en Côte d'Ivoire», doctoral thesis, Univ. F. Houphouët-Boigny, Abidjan, 2015, p. 31.
 - 24 H. Kelsen, *Théorie pure du droit*, Paris, Dalloz, 1962, 2nd ed. Paris, LGDJ, 1999, p. 146: «The guarantee of equality before the law means only that the law-applying organs are only permitted to consider those differences which the laws to be applied themselves recognise, which is thus a mere affirmation of the general principle that the law must be applied consistently».
 - 25 See article 1 para. 1: «Any person, regardless of sex or nationality, who undertakes to perform professional activities under the direction and authority of another individual person or legal entity, public or private, in exchange for remuneration, shall be considered a worker or an employee within the meaning of this Act. Neither the legal status of the employer nor that of the employee shall be taken into account in determining whether a person is to be considered a worker».
 - 26 Art. 91 of the Labour Code for Overseas Territories: «Where working conditions, professional qualifications and performance levels are equal, the wages paid to all workers shall be equal, irrespective of their origin, sex, age or status under the conditions provided for in this title».
 - 27 O.O. Sidibé, «Quel modèle d'inspiration pour le droit du travail malien depuis le Code du travail de 1952», *Bulletin de droit comparé du travail et de la sécurité sociale*, Comptasec, 2005, p. 144. According to Article 21 of the Malian Labour Code of 1962, «Employers may only recruit foreign workers after obtaining authorisation from the National Directorate of Labour, under conditions to be determined by order of the Minister of Labour». It further specifies that «The Head of Government may, by a decree issued in the Council of Ministers, and depending on economic, demographic, social or sanitary requirements, prohibit or limit the recruitment possibilities enjoyed by companies, or organise workforce balancing amongst the various territorial regions».

illustrated by the country's 1961 ratification of ILO Convention no. 111²⁸, and its adoption of a Labour Code²⁹ which, in parallel to that ILO Convention, established nationality as a prohibited ground of discrimination.

But to the extent that equal treatment also means treating people who are in different situations differently, lawmakers isolated specific situations where a difference in nationality might impact the employment relationship and thus render identical treatment inappropriate. Such was the case for expatriate contracts. A distinction was made however between expatriate contracts under common law and exceptional expatriate contracts.

There were two types of expatriate contracts that permitted special treatment. The first was provided under Article 94 of the Labour Code for Overseas Territories³⁰. According to this text, an expatriate contract could only be entered into by a foreign employee. Litigation concerning this text confirmed this interpretation³¹. A distinction was thus made between "local" employment contracts and «expatriate» employment contracts³².

Later, the social partners, in Article 57 of the Interprofessional Collective Agreement of 1977, entitled «expatriation indemnity», adapted the rules for expatriate contracts, adding an aspect that altered the original spirit of the law. In the text, two categories of expatriate contracts were established. The first was described in paragraphs 1 and 2 and referred to contracts as provided under the Overseas Territories Labour Code, entered into by foreign

28 See art. 1 of ILO Convention no. 111: «1. For the purpose of this Convention the term discrimination includes: (a) any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation».

29 Law no. 64-290 of 1 August 1964 establishing the Labour Code, JORCI, no. 44, special iss. of 17 August 1964, p. 1059.

30 Article 94 para. 1 of the Labour Code for Overseas Territories: «When the climatic conditions of the region of the place of employment differ from those of a worker's habitual residence, and when the worker is subject to particular hardships as a result of his removal from his place of habitual residence to his place of employment, the worker will receive an indemnity to compensate him for the additional expenses and risks he incurs for his removal to and residence in his new place of employment».

31 CSCJ, 23 November 1962, *Mr. Flandre (haulier) vs. Mr. Mignot*, unpublished. Upholding the ruling recognizing a French citizen's status as an expatriate worker, the Supreme Court held that: «Whereas the status of expatriate entitling the worker to leave at a base rate of 5 days per month of actual service, in accordance with the provisions of combined articles 95-3 and 121 of the CTOM, referred to in Article 122 cited in the pleadings, depends not on the employee's place of recruitment but on the situation of his habitual residence, and whereas under the provisions of article 2 of order no. 6556 of 3/9/1952 providing transitional provisions for the attribution of leave in French West Africa (AOF), the criterion to be used is the worker's location outside the limits of West Africa, and the contested decision cannot therefore be impugned for having held, in a sovereign appraisal, that Flanders, who was originally from France and came from there in execution of a contract of employment entered with a prior employer, should be categorised as an expatriate».

32 CSCJ, ruling no. 302/12 of 19 April 2012, unpublished: An employee of French nationality holding an «expatriate» employment contract enters a legal appeal for a performance bonus reserved for employees with «local» employment contracts. The appeal is dismissed on the grounds that: «The employee was informed upon recruitment that his remuneration, which is revised upwards each year, would include the seniority bonuses and allowances shown in the payslips submitted to evidence, but that as a holder of a non-local expatriate contract he would not be entitled to performance bonuses». See also CSCJ, 13 of 18 April 2013, ruling no. 221, unpublished.

persons³³. The second type, which was actually a mutation of the so-called «expatriate» employment contract, was awarded not to a foreigner but to an Ivorian, assigned to work under an employment contract at a location at least 500 kilometres away from their usual place of residence.

Apart from this fundamental difference, the reasons underlying the difference of treatment involved in these two types of so-called expatriate contracts were almost identical, namely the special requirements imposed upon the employee, due in particular to climatic conditions and distance (requiring removal from the worker's place or country of residence to the place of employment). These texts also specified the nature of the difference in treatment. It was provided to compensate for the financial losses suffered as a result of employment. As such, Article 94 of the Overseas Territories Labour Code discussed the provision of compensation for the additional expenses and risks to which employees are exposed by their removal to their new place of work. Although it is quite old, the principle underlying expatriate contracts has not yet been challenged in Ivorian law.

The possibility of a second form of expatriate contract meriting different treatment as part of the promise of equal treatment of workers was established by a Convention signed in March 1960 with Burkina Faso. Contrary to the prior hypothesis, this Convention on the expatriation of workers from Burkina Faso to Côte d'Ivoire made no mention of the issue of a worker moving far from home, let alone to a different country. It focused instead on certain points that generally capture the unequal treatment given to foreign workers, in terms of working conditions, wages, rights to social protection, etc.

But Ivorian lawmakers understood that it was useless to promise equal treatment in employment to foreigners without concomitantly working to bring about conditions where that equality could be realised, so a number of guarantees were provided to achieve that result.

B - GUARANTEES BACKING THE PROMISE

The guarantees provided for this promise of equality were provided at two levels: measures towards making immigration law consistent with foreigners' right to employment, and the assimilation of foreigners into the national community.

In regard to this first guarantee, the necessary coherence between the rights mentioned has been addressed in Article 26.8 of the Labour Code, which settles the conflict in favour of immigration law³⁴. One of the strong points of this guarantee is that it has opened up access to Ivorian territory, thus including it in an area within which all are equal. For this purpose, three categories of foreigners were selected. The first includes nationals of the West African

33 Art. 57 of the Interprofessional Collective Agreement of 1977 makes reference to «any worker recruited outside the territory of the Republic of Côte d'Ivoire and required by the employer to move from his habitual place of residence».

34 Article 26.8 para. 1 of law no. 2015-15-532 of 20 July 2015 of the Labour Code, specifying that the provisions of the Labour Code «shall not impede the application of regulations governing the conditions for the admission and residence of foreign persons».

Economic and Monetary Union (WAEMU)³⁵, the second corresponds to foreign persons from the Economic Community of West African States (ECOWAS)³⁶, and the third to third-country nationals. For the first two categories, there is a fundamental principle applied to determining the status of these foreign persons. That principle is freedom of movement. Any citizen of the Union³⁷ or of the Community (CEDEAO)³⁸ may freely travel to and take up residence in another of these countries, and engage in the profession of their choice there. The only difference between the two statuses has to do with visa fees, which are higher when the foreigner is a citizen of the Community.

It is however important to note that foreign persons' freedom of movement and access to work in Côte d'Ivoire did not originate in the ECOWAS and UEMOA treaties, as the practice itself preceded the law. Indeed, until 1990, the date of the adoption of the first Ivorian law on the entry and residence of foreigners in Côte d'Ivoire, no real migration policy existed. In practice, because the climate was favourable to the reception of foreigners and migratory flows were uncontrolled, any foreigner could freely go to Côte d'Ivoire and settle there to engage in paid or unpaid occupational activity. This situation had the effect of rendering obsolete the decree-law of 12 June 1932 on the residence of French and foreign citizens in French West Africa³⁹, adopted in the colonial era and not repealed until the law of 1990 on the entry and residence of foreigners in Côte d'Ivoire⁴⁰.

35 The West African Economic and Monetary Union (UEMOA) was created by a treaty signed by the States Parties at Dakar (Senegal) on 10 January 1994, and entered into force on 1 August 1994 after its ratification by all signatory States. It includes eight countries: Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo. It is headquartered in Ouagadougou, Burkina Faso.

36 The Community of West African States was created by a treaty signed between the States Parties at Lagos, Nigeria in 1975. Originally confined to the economy, the scope of the Treaty has since 1993 extended to political cooperation between the Member States. ECOWAS comprises fifteen member states (following the withdrawal of Mauritania in 2000): Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

37 Article 91 of the WAEMU Treaty: «(1) Subject to limitations justified on grounds of public policy, public security or public health, nationals of any Member State shall enjoy freedom of movement and residence throughout the territory of the Union, implying: - the abolition of discrimination amongst Member State nationals on the basis of nationality in regard to job seeking and the exercise of employment, with the exception of jobs in the Public Service; - the right to movement and residence within the territory of all Member States; - the right to continue to reside in a Member State after having worked there».

38 See Article 59 of the ECOWAS Treaty, on the subject of immigration: «(1) Citizens of the community shall have the right of entry, residence and establishment, and Member States undertake to recognise these rights of Community citizens within their territories in accordance with the provisions of the Protocols relating thereto. 2) Member States undertake to adopt all appropriate measures to ensure Community citizens' full enjoyment of the rights referred to in para. 1 of this Article. 3) Member States undertake to adopt, nationwide, all measures necessary for the effective implementation of the provisions of this Article».

39 Decree-Law of June 12, 1932 relating to the residence of French and foreigners in French West Africa, JOAOF.

40 See Article 29 of Law no. 90-437 of 29 May 1990 on the Entry and Residence of Foreigners in Côte d'Ivoire, JORCI, 9 August 1990, p. 264: «All previous provisions contrary to this law, including the decree-law of 12 June 1932 establishing conditions for the admission and residence of foreigners in French West Africa are hereby repealed».

Also, it is safe to say that Ivorian practices regarding foreign labour were established in advance of the conventions on the same subject concluded between certain States and Côte d'Ivoire. Unlike Ivorian practices, however, these conventions were necessarily limited to specific domains, like the Conventions of 1977⁴¹ and 1995⁴² entered between Côte d'Ivoire and France.

But in their promotion of equality of treatment for foreigners, lawmakers were not content to guarantee them access to Ivorian territory. They also provided for the integration of foreign persons into the Ivorian community, which is a precondition of their occupational advancement. However, in all the means they have used - whether political discourse, law or regulation - they have always equated integration into the Ivorian community with accession to Ivorian citizenship. The starting point for this comparison is to be found in the actions of President Houphouët-Boigny; first during the colonial period when, in lieu of the «confederation»⁴³ proposed by Senghor, he proposed an «African nationality»⁴⁴, and then, right after independence, when he suggested to his fellow members of the Council of Entente and the Ivorian National Assembly the adoption of the principle of dual nationality. Even though his proposal was rejected internally by the Ivorian National Assembly, he circumvented this rejection by proceeding to massively recruit foreigners into all sectors of activity, from the education sector⁴⁵ to high-level positions in the Ivorian government⁴⁶. In addition to these foreign persons, who were easily able to obtain Ivorian nationality, he also granted political rights, including the right to participate in presidential elections, to West African foreigners. Furthermore, he acted to bring foreigners into the country, in particular from Burkina Faso, and to settle them in the west of Côte d'Ivoire in villages created for them. To facilitate their integration, he then arranged for the application of a 1963 law - which was not ultimately promulgated - and resolution of the political bureau of

41 Convention between the Government of Côte d'Ivoire and the Government of the French Republic concerning the movement of persons, Decree no. 77-358 of 9 June 1977 ratifying the Convention entered between the Republic of Côte d'Ivoire and the French Republic, JORCI, 4 July 1977, p. 1223.

42 Convention on Social Security between the Government of the Republic of Côte d'Ivoire and the Government of the French Republic, JORCI, no. 2, of Thursday, 12 January 1995, p. 30.

43 F. Cooper, «Empire, nation et citoyenneté: la France et l'Afrique», 33rd Marc-Bloch Conference, *op. cit.*: https://www.ehess.fr/sites/default/files/pagedebase/.../2011_conference_marc_bloch.pdf, p. 8.

44 *Ibid.*

45 SCCJ, ruling no. 77 of 23 January 1997, concerning an employee of Beninese origin who had signed an employment contract in 1991 with Collège Pascal Gué (Man) as a French teacher.

46 F. Houphouët-Boigny, Press Conference of the President of the Republic, President of PDCI RDA, *op. cit.*, p. 2: «In our governments we have had ministers from various friendly but foreign African countries. We have foreign prefects. We have foreign ambassadors. We have foreign department heads. And in everyday life we have rural people from other African territories, who have the same rights as Ivorians and participate in building the nation».

PDCI RDA⁴⁷, the single party with power in the country, which stipulated that the land would belong to those who developed it⁴⁸.

For some observers, the roots of the Ivorian economic miracle of the 1970s are to be found in this policy of openness. But this benevolent attitude towards foreigners has been challenged. Equal treatment of foreigners is now gradually giving way to unequal treatment.

II - OBSERVED INEQUALITY IN THE TREATMENT OF FOREIGNERS

Unequal treatment of foreigners in Ivorian law impacts both foreigners seeking employment **(A)** and foreign job holders facing dismissal **(B)**.

A - THE INEQUALITY OF TREATMENT EXPERIENCED BY FOREIGNERS SEEKING EMPLOYMENT

Until 1977, when the Ministry of Labour and Ivorisation of Executives was created, the only difference in the treatment experienced by foreigners seeking employment was the requirement to obtain a work visa⁴⁹. But this provision was more symbolic than substantial, because in light of the favourable climate for the employment of foreigners and precautions taken in providing for their issuance⁵⁰, applications for work visas were almost systematically approved by the labour administration. Moreover, the administration did not provide any oversight in the matter. Thus, any foreigner could sign an employment contract without having actually satisfied this formality.

The beginning of the unequal treatment can be traced back to the creation in 1977 of the Ministry of Labour and the Ivorisation of Executives, which released certain memoranda introducing ivorisation plans, intended to limit the recruitment of foreigners to the education system and public enterprises. It was at this time that hitherto latent litigation concerning

47 Y. Tano, «La précarité des titres fonciers en Côte d'Ivoire», in Pouvoirs publics et développement en Afrique, Toulouse, SEDUSS, 1992, p. 158: «There is enough arable land for all; what is missing are people to cultivate it. The Government and the Party have therefore decided, in the interest of the country, to give every native or naturalised citizen who develops a parcel of this country's land, of any size, the right to the definitive enjoyment thereof, transferable to their heirs».

48 Non-promulgated law of 20 March 1963. For more details on this law, see S. Boni, *op. cit.*, p. 156; M. Kone, *Quelles lois pour résoudre les problèmes liés au foncier en Côte d'Ivoire*, Grain de sel, no. 36, September-November 2006, p. 1.

49 These visas are currently governed by Article 7 of Decree no. 96-287 of 3 April 1996 on employment contracts. Since independence, they were governed successively by Article ID3, paras 2 and 3, of Law no. 64-290 of 1 August establishing the Labour Code, JORCI, no. 44, Special issue, p. 1059: «They (employment contracts) are subject to OMOCI approval of the place of employment and otherwise must be given approvals by the inspector of labour & employment relations law or a representative of the same. For workers employed outside the Republic, employment contracts shall be contingent upon OMOCI approval of the documents submitted».

50 CSCJ, 20 November 2014, ruling no. 596/14, unpublished. The supporting text cited in this ruling is formulated as follows: «If the authority competent to grant the visa has not returned a decision fifteen days after the visa application has been filed, the visa will be considered granted» - contrary to the assumption that the visa would in such case be tacitly rejected.

work visas began to come to the surface, allowing the courts to rule that contracts entered in the absence of a work visa were invalid⁵¹.

Since 1997, measures restricting access to employment from abroad have been strengthened. Not only has the «ivorisation of jobs» that began in 1977 been extended to private companies⁵², it has also been established that «prior to being hired at any company doing business in Côte d'Ivoire, non-Ivorian workers must have a contract of employment or a hiring letter approved by the Ministry of Employment on the specific form provided for such purpose». The same applies to visa requirements, which have also been tightened⁵³. The labour administration is likewise expected to assess visa applications in consideration of the employment situation in the sector concerned⁵⁴. Provisions are also made for violations and the corresponding sanctions against violators, whether employees⁵⁵ or employers⁵⁶.

While it was expected that the 2015 reform of the Labour Code would rectify the situation, it only echoed the same principle, and included in the Labour Code provisions that had previously been considered merely regulatory⁵⁷. But inequality of treatment is not limited to job seekers. Foreign nationals who are already employed are also affected.

B - UNEQUAL TREATMENT OF FOREIGN JOB HOLDERS

The unequal treatment given to foreigners with employment contracts is reflected in the consideration of their nationality as a reason for their dismissal. This is considered discrimination, because the unequal treatment is based on grounds prohibited by law. Such was the case, for example, in the ruling handed down on 7 May 2005 by the Abidjan Court

51 CSCJ, 20 November 2014, *op. cit.*: «Whereas it has not been proven that a visa application was in fact brought before the Labour Office of Côte d'Ivoire for Mr and Mrs Guillot, the consequent invalidation, pursuant to Article 3 (8) of Decree no. 65-121 of 2 April 1965 establishing procedures for the establishment of employment contracts, renders the former employer liable for damages»; see also SCCJ, 15 January 1995, ruling no. 05-91, unpublished: «Provision ID3 of the Labour Code, which stipulates that contracts are void where no visa has been issued by the OMOCI, is a matter of public policy».

52 The 2004 interdepartmental order clearly states: «Any job opening must be advertised for two months with State-approved placement agencies». See also Article 7 of that order, which introduces a difference in visa fees depending on whether the candidate for employment is of West African (ECOWAS), African or non-African origin, and depending on whether or not the job is in a management position.

53 Art. 2 para. 2 of the order: «If at the end of this one (1) month period the post is not filled by a national, the employer is authorised to recruit any candidate meeting the required profile, in strict compliance with the provisions set forth in this order».

54 Art. 4 para. 1 of the order: «Any application for a work visa or renewal thereof shall be examined in light of the employment situation in the sector concerned».

55 Violation of the regulations on the employment of foreigners in Côte d'Ivoire by foreign persons applying for employment is punishable by a ban on employment in Côte d'Ivoire.

56 In addition to the payment of visa fees, employers shall incur a penalty equal to three months of the worker's gross monthly wages per year of violation. See art. 10 of the order.

57 Art. 11.1, paras 2 and 3: «Any job opening must be reported to the public employment agency, published in a national daily newspaper, and possibly advertised by other means of communication. If no national has met the required profile one month after the first announcement of the job opening, the employer is authorised to recruit any other candidates».

of Appeal. In that ruling, the AGEPE⁵⁸ not only declined the employer's request to renew an employment contract, but furthermore asked the employer to «ivorise» the position⁵⁹. As in the previous case, the unequal treatment received by foreign job holders was the result of the policy of «ivorisation of jobs» implemented in the 1970s, in a manner similar to the measures taken in the majority of French-speaking African countries, such as Senegal, Gabon and Cameroon⁶⁰, which had decided to free themselves from French control over their national government systems.

In Côte d'Ivoire, for example, until 1970, a majority of the senior civil servants in the civil service were French nationals. The stated objective being to encourage the replacement of the latter by local executives, an obligation was thus imposed on all public companies to submit plans for the ivorisation of their personnel.

Litigation concerning the subsequent process of the ivorisation of jobs has given rise to legal controversy. The question was put to the courts as to whether the ivorisation of jobs could be considered a legitimate ground for dismissal. For most lower court judges, the answer was affirmative⁶¹. The Supreme Court, though it has certainly not been without its critics, showing full agreement in some of its rulings with the findings of the lower court judges, mostly found that discrimination had been suffered by the employees concerned⁶².

However, because of the lack of case law tracking in Côte d'Ivoire, a decision that should have served as a guide for the interpretation of the law by all lower court judges failed to exercise its full pedagogical impact, and several rulings to the opposite effect were identified at a later date⁶³.

58 Employment Study ans Promotion Agnecy [Agence d'Étude et de Promotion de l'Emploi].

59 See for example the letter sent by the Employment Research and Promotion Agency (AGEPE) in response to a request submitted on 24 October 1996 by the company SAEI-ASTRAL, seeking to renew the employment contract of an employee of foreign origin. In this letter, according to the ruling that cites it, the AGEPE not only refused to approve the employment contract submitted to it by the employer, it furthermore asked the employer to find an Ivorian to fill the job in question. See Abidjan, 1st Labour Chamber, ruling no. 503 of 7 May 2005, *Juris social*, no. 65, p. 24.

60 I. L. Miendjiem, «Egalité et discrimination en droit camerounais du travail», 3rd cycle Ph.D. thesis, University of Yaounde II, 1995-1996.

61 Abidjan, 1st Labour Chamber, ruling no. 503 of 7 May 2005, *op. cit.*, p. 23: In this particular decision, the judge declared the dismissal of a worker of foreign nationality illegitimate not because of any objection to the use of the grounds invoked - the worker's foreign nationality - as a basis for terminating the contract, but because the employer had failed to find an Ivorian to take the position; Daloa, 24 June 1998, ruling no. 129, *Juris-social*, no. 13, January 2002, p. 12: The court held that the ivorisation of the job of a college professor, subsequent to the memoranda issued by the Minister of National Education, as the employer's supervising authority, constituted a serious and legitimate grounds for dismissal.

62 CSCJ, labour division, 20 March 1997, ruling no. 75, *Juris-social*, no. 2, February 2002, p. 6: «It is an act of wrongful termination for any employer to dismiss an employee of foreign origin who has not engaged in any professional misconduct purely on grounds of ivorisation of jobs pursuant to the instructions issued by the Minister of the Public Service».

63 CSCJ, 22 May 2014, ruling no. 360/14 unpublished, *op. cit.*

In conclusion, the above analysis demonstrates that Côte d'Ivoire, as a host country and therefore a country receiving immigrants, sought at first to make the assimilation of foreigners a tangible reality. Very quickly, however, the country was caught up in the economic crisis and its corollary, scarcity of employment, and, as happens everywhere, foreigners were blamed. The result was the imposition of restrictive measures, some of which have taken the form of genuine discrimination based on nationality.

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