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# The repression of immigration infractions in the French criminal courts (1880-1938)

Elie-Benjamin Loyer<sup>1</sup>

The question of whether pre-1945 France established an immigration policy highly depends on one's definition of "policy". A certainly unvarying and maybe simplistic vision of the State, associated with an institutional approach to public action, led to an exaggeration of the freedom of movement in the 19<sup>th</sup> century and to an underestimation of the part played by migration regulation mechanisms. Going beyond the terms of the "positive State"<sup>2</sup>, it is clear that a number of actors and institutions played an important but little known role in the regulation of immigration. Even if they are essential in the local application of migratory legislations and true "public action instruments"<sup>3</sup>, the courts in particular have been largely undervalued and have not been of much interest to historians until now<sup>4</sup>. And yet these institutional places were an interface between the national and local levels at a time when migration regulation and even migratory policies did not fall under the control of the central State only but depended on local authorities as well.

This certainly issues from the impossibility to limit justice to simply administering a deeply dual legal field. Indeed, this field is stuck between a legal formalism which implies that the legal structure is strictly independent from social life and a just as speculative instrumentalism that considers law as a reflection or a tool in the hands of the dominants<sup>5</sup>. An analysis of justice, of criminal justice here, considered as an immigration regulation and management instrument, cannot ignore either the instrumental or axiological dimension of law. This is why in this article we will study law

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<sup>2</sup>Giandomenico Majone, "From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance", *Journal of Public Policy*, vol. 17, No. 2 (May - Aug., 1997), pp. 139-167.

<sup>3</sup>Pierre Lascombes et Patrick Le Galès, "Introduction : L'action publique saisie par ses instruments", in *Gouverner par les instruments*, Paris, Presses de Sciences Po (P.F.N.S.P.), 2005, pp. 12-14.

<sup>4</sup>Frank Caestecker, "The Transformation of Nineteenth-Century West European Expulsion Policy, 1880-1914", in A. Fahrmeir, O. Faron, P. Weil (eds.), *Migration Control in the North Atlantic World. The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period*, Oxford, Berghahn, 2003, p. 120.

<sup>5</sup>Pierre Bourdieu, "La force du droit. Éléments pour une sociologie du champ juridique", in *Actes de la recherche en sciences sociales*, vol. 64, septembre 1986, p. 3-19.

together with its application: on the one hand, the emergence of the foreigner as a legal category, which corresponds to a wider monopolisation process of migrations by the sovereign power; on the other, the criminal repression that evolves from a regulation of free migrations to an actual tool knowingly used to support public immigration policies.

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*The infraction to a deportation order: the extra-ordinary practices of an ordinary mobility control structure*

The status of deportation changes during the second half of the 19<sup>th</sup> century. From a measure mainly intended for vagrants, it gradually evolves into a measure used to manage immigration. With the 1849 law on deportation, according to the rapporteur, the aim is to “defend society against a plot from wandering agitators, the number of which has increased, and to fight against begging and vagrancy”. Deportation, as discretionary as it may be, must therefore be included in a larger legal context and considered as one of the tools the government can use to regulate migrations during a 19<sup>th</sup> century whose reputation as the golden age of freedom of movement must be moderated<sup>6</sup>. In practice, deportation is considered as an accessory sentence<sup>7</sup>, even if the legal strictness forbidding the use of “sentence” as deportation is a purely administrative measure<sup>8</sup>. It is clear with this 1896 *Répertoire de police administrative* in which the December 1849 law and the notion of “*haute police*” (surveillance police)<sup>9</sup> are associated without any legal justification.

Besides, the deportation of foreign beggars and vagrants is intended as an accessory consequence of their condemnation by article 272 of the *Code Pénal*. In fact, the infraction to a deportation order is considered as a legal repeat offense in which an administrative act is assimilated to a legal condemnation. This is the reason why the sentences are so similar between the infraction to a deportation order and the local

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<sup>6</sup> Paul-André Rosental, “Migrations, souveraineté, droits sociaux. Protéger et expulser les étrangers en Europe du XIX<sup>e</sup> siècle à nos jours”, *Annales. Histoire, Sciences Sociales* 2/2011, p. 339.

<sup>7</sup> No one but Iouda Tchernoff notices that deportation, often pronounced after a sentence, can be considered as “an accessory sentence”. See I. Tchernoff, *Le droit de protection exercé par un Etat à l'égard de ses nationaux résident à l'étranger*, thesis for the law PhD, Law University of Paris, 1898, p. 445.

<sup>8</sup> Paul Desjardins, “La loi de 1849 et l'expulsion des étrangers”, *Revue des Deux Mondes*, avril 1882, 1/2, pp. 657-680.

<sup>9</sup> Article “Etranger” in Louis Courcelle, *Répertoire de police administrative et judiciaire*, Paris-Nancy, Berger-Levrault, 1896, p. 683.

banishment, a measure specifically used against repeat offenders of serious crimes. In both cases, courts don't condemn to fees or short duration imprisonments. On the other hand, imprisonments are quite long with sentences from 3 months to 1 year (fig. 2), whereas such durations tend to disappear for vagrancy and begging<sup>10</sup>. As for the local banishment, the infraction to a deportation order is a repeated offense and therefore the mitigating circumstances' rate is logically low<sup>11</sup>. Except for these differences in intensity, the legal profiles of these movement offenses (vagrancy, begging, local banishment, infraction to a deportation order) are pretty close: in each case the imprisonment rate is very high, the recidivists are numerous and these are the crimes for which the 1863 law on *flagrante delicto* is most often used. Hence, deportation is a more ambivalent measure than it seems at first sight. The rates per 100,000 inhabitants regarding foreigners' vagrancy and infraction to a deportation order are similar (fig. 3) and prove that deportation is an additional tool used for the administration of vagrant and wandering populations amongst which foreigners are the main targets—this is obvious when data is available.

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### 1880's-1890's: new specific legislation for foreigners clarifying legal identities

The judicial practices meant to regulate the foreign presence on the French territory differ from the usual handling of vagrancy and begging only during the interwar period. However, on a legal level, the foreigners' issue arises anew everywhere in Europe during the 1880's. In France, some measures (the 2 October 1888 decree; the 8 August 1893 law), the consistency of which is obvious, are taken: the aim is to establish an identity defined in writing, to standardize the practices and to centralize the information about foreigners at a national level<sup>12</sup>. This new police management of identity documents is not only part of the long history of identification techniques for individuals likely to be

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<sup>10</sup>Data are coming from an annual statistical volume, *Compte général de la justice criminelle*, which has been completely studied from 1880 to 1938.

<sup>11</sup>This close relationship does not disappear afterwards: two decree-laws on both measures are published on 30 October 1935; and they are studied together by Xavier Barthélémy, *Des infractions aux arêtes d'expulsion et d'interdiction de séjour*, Paris, law thesis, 1936.

<sup>12</sup>Gérard Noiriel, *La tyrannie du national : le droit d'asile en Europe 1793-1993*, Paris, Calmann-Lévy, 1991, pp. 169-176.

disaffiliated<sup>13</sup>; it also shows the new role played by the State in the clarification of legal identity. Going further, these measures from the end of the 1880's and the beginning of the 1890's are inherent to a "strengthening of political power" as Marcel Gauchet writes, which marks the transition from an "authority State" to an "organisational State"<sup>14</sup>. At a time when the accessibility of the territory becomes real thanks to the railway, the roads and the canals, the State can develop itself to the point of radically enhancing its missions: the functions of a social State, which will soon impose itself, appear in addition to its mission of conservation and law enforcement, which logically implies the control of the movements and presence of non-citizens<sup>15</sup>.

Even if it still refers to the authority principle, the will of identification now implies something different: it is about knowing in order to control but also to differentiate nationals from non-nationals. The injunction to clarify nationalities inherent to the measures from 1888 and 1893 is typical of the "rational bureaucracy" described by Max Weber. However, the concrete implementation of the decree shows that if the initiative came from the government and if the execution falls to the *préfet* (prefect), the local authorities end up playing an important role in the process of determining legal affiliations. The mayors, contact points between a descending administrative logic and an ascending representative logic (they are being elected since 1884), are directly involved as they register the residency declarations. Their inquiries, usually meticulous, are often determining as the "foreigner" category remains quite ambiguous and far from a legal rationality that clearly defines who is French and who is not. In March 1895, the mayor of Bossay-sur-Claize (a small 1,500-inhabitant town in Indre-et-Loire) thus reported to Loches' *sous-préfet* the "quite singular case" of a certain Austro-Hungarian named Charles L., who was born and had been living his all life in the town, and refused to acknowledge his quality of foreigner. The mayor seems puzzled by this 77-year-old man who absolutely refuses to declare himself on the grounds that "he is a sworn watchman (*garde particulier*) and has been sworn for 40 years, during which he

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<sup>13</sup>Robert Castel, *Les métamorphoses de la question sociale. Une chronique du salariat*, Paris, Fayard, 1995.

<sup>14</sup>Marcel Gauchet, *L'Avènement de la démocratie*, vol. II, *La Crise du libéralisme*, Paris, Gallimard, 2007, p. 194 and p. 177.

<sup>15</sup>Michael Mann, *The Sources of social Power*, vol. II, *The Rise of Classes and Nations-States, 1760-1914*, Cambridge, 1993, p. 375. In 1760, civil expenses represent 25% of the major European powers' expenses; 75% around 1900.

gave several fines.”<sup>16</sup> Stuck between the legal logic, according to which the document makes the nationality and the logic of acquaintance, the mayor does not hesitate to intercede, answering for Charles Lucas and delivering a short inquiry in which he insists on his bonds with France. The criteria of a deserved nationality are defined as his being born in France, being at the service of public order, feeling French and having a son who died fighting for France in 1870. Finally, the only legal concern seems less related to the sworn watchman’s nationality than to the risk of fines established by a man with foreign documents being illegal. On the contrary, in 1888, the mayor of Neuvy (a 400-inhabitant town in Marne), who refuses to grant a residency declaration to a Russian subject from his town, justifies his decision to Epernay’s *sous-préfet* (deputy prefect) by insisting on how foreign this stranger is. It is impossible to answer for Louis Z. who is “homeless” and still is considered a foreigner in the town: “he is known as the Polish and as a man who frequently devotes himself to drinking, to brutality and to vagrancy”. The fact that he has been in the region “for 8 or 9 years” and that he works there do not really weigh in the mayor’s decision, who describes him as an alcoholic, and a poor and dangerous vagrant. Because he is unknown, he is a stranger. Because he is a vagrant and homeless, he is a stranger again. And because he can’t be granted papers, he becomes a foreigner with no papers. Soon after, he becomes clearly unwanted since a deportation order is finally issued against him<sup>17</sup>.

On a national level, between the end of the 1880’s and the middle of the 1890’s, the nationality granted by the local community is asked to match the document nationality given by the administration. In this view, the 1888 decree and the 1893 law helped the clarification process but also had an educational role. Being the responsibility of the judges of the peace, individuals who did not submit to the 1888 decree are rarely taken to court and the prefectural administration often is sympathetic. In 1891, the year of the census, the *Sûreté générale* (general Security services) issues lists of people who did not submit, thus using the complementarity of “paper instruments” that were implemented for a totally different reason. However, establishing a list of these people is not enough without the actual willingness of the prefect to handle the situation. This is the case in the Indre-et-Loire region, where it is obvious that the prefect is temporizing but fails to

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<sup>16</sup> Archives Départementales d’Indre-et-Loire (now A.D. 37), 4M677, information note regarding Charles L. Nothing indicates that his case has been settled afterwards as his name does not appear in the *Bulletin des lois, parties supplémentaires*, which lists all naturalised people (Archives nationales, BB 27 1243-1247).

<sup>17</sup> Archives Départementales de la Marne (now A.D. 51), 54 M 39.

hide the inertia of his administration that is not really interested in the presence of barely a thousand foreigners on a mainly rural territory. It is not before March 1895 that a *juge de paix* (judge of the peace) from Tours condemns, on request from the prefecture, an Italian who refused to submit to the decree to a fine of 8 francs. Even in the departments where the foreigner presence is more important, the repression of non respect of the 1888 decree is quite weak. In Châlons-sur-Marne, the *juges de paix* thus waited 1890 to start writing fines related to this non respect and as of 1895 they simply disappear. In total, only 133 fines were written in 5 years whereas in a 1894 letter sent to the *Sûreté générale*, Marne's *préfet* reports that more than 4,000 foreigners (out of 19,000) have not filled their residency declaration in his department<sup>18</sup>. However, this inertia and lack of enthusiasm do not mean the decree has not been implemented at all: in Indre-et-Loire, with a little less than 200 individuals refusing to submit to the decree in 1892, almost 80% of the department's foreigners have been registered.<sup>19</sup>

The *juge de paix* seems reluctant to take the individuals unwilling to submit to the decree to court and this is certainly why the 1893 law includes a criminal repression enforced by the *tribunal correctionnel* (court for minor criminal endeavour). Entrusting the criminal judges with the repression of administrative offenses is actually quite close to the idea of decriminalisation (reducing a crime to an offense). Having a *tribunal correctionnel* judge an administrative offense follows the same logic, that is to say not limiting the repressive capacity of the State and avoiding the great uncertainty represented by the *juge de paix* who is essentially a local actor and remains, until the beginning of the 20<sup>th</sup> century, more of a conciliator than a law technician<sup>20</sup>.

If it seems more regular and less random, the repression of infractions to the 1893 law is not that severe. Condemnations to a fine are the rule (fig. 2) and mitigating circumstances are granted to around 70% of convicted individuals. Most importantly, after a period of numerous condemnations when the law was promulgated (1893-1894), the rate significantly decreases to reach a very low level around 1906 (fig. 5). The same phenomenon can be observed with the infractions to deportation orders, the rate of which also reaches a historical minimum in 1906 with 122 defendants for 100,000

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<sup>18</sup>A.D. 51, 54 M 39. The proportion is around 80% registered foreigners.

<sup>19</sup>See the correspondence between the *Sûreté générale*, the Indre-et-Loire *préfet* and Tours' *procureur de la République*, A.D.37, 4 M 677.

<sup>20</sup>Serge Defois and Vincent Bernaudeau, "Les juges de paix de Loire-Atlantique (1895-1958): une magistrature de proximité?", *Une justice de proximité, la justice de paix (1790-1958)*, Paris, Presses Universitaires de France, 2003, pp. 195-223.

foreigners listed in France (fig. 4). It is thus exactly when the public opinion seems openly xenophobic (the word first appeared in 1903 according to Laurent Dornel<sup>21</sup>) that the criminal justice seems the least severe towards these special crimes.

Pretty often, the cases of non-registering people are closed by the *Procureur* (public prosecutor). Once again, the role played by municipal authorities is essential in deciding whether a case should be taken to court as they are the ones determining the reputation of the individual who does not submit to the decree. If Sainte-Menehould's *Procureur* decides during autumn 1905 not to take a farrier of German nationality (Alsatian) to court, it is mainly because Epense's *adjoint au maire* (deputy mayor) provides "proofs of morality" to this "good subject" whom he has known for two years and who gracefully submitted himself to the residency declaration. The police statement emphasises that the absence of declaration is less the demonstration of a willingness to escape the authorities than of a lack of concern underlined by the police officers' inquiry. This example is typical of police and legal repression being used to reach their goal: the infraction is obvious and resorting to the police is justified because despite being asked twice by the *adjoint au maire* to declare himself, the young farrier "has not obeyed his injunctions". However, being intimidated by the police officers is enough and opening a legal procedure seems useless<sup>22</sup>. This case is a perfect example of a negotiated illegality, in which several different solutions are available to the authorities to make the foreigner declare himself, legal repression being nothing more than their last resort. When there is no actual political pressure, when the willingness to assimilate mostly prevails<sup>23</sup>, criminal justice keeps proceeding by condemning offenders to the mostly educational sentence of a 16-franc fine, thus staying relatively institutionally independent. The drop of repression as of 1895 might underline the virtues of legal education, which contributes to the efficient establishment of an administrative procedure. Maybe this drop also shows policemen and public prosecutor departments are less zealous to take to court a crime that is not considered too harmful by the administration and the executive power.

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<sup>21</sup>Laurent Dornel, *op. cit.* p. 21.

<sup>22</sup>AD 51, 11 U 144.

<sup>23</sup> Laurent Dornel, *op. cit.*, pp. 215-218.



*When the judicial review is beyond foreigners' reach: is justice an additional tool in the hands of the Administration? (1910's-1930's)*

The breach that appeared in the 1880's and 1890's is more visible on a legal level, considering the new correspondence between the State and the National. It is significant that the 1888 decree appears very soon after the first census realised in 1886 in order to distinguish national citizens from non-national individuals before the 1889 elections. As of that time, the number of circumscriptions no longer depends on a department's total population but only on the listed French population. The rationalisation of the legal and political bond between citizen and State based on the criteria of one's nationality results in the marginalisation of foreigners from the republican legal order. It is certainly not a coincidence that at the same time the possibility of actually contesting deportation administrative decisions before the administrative justice is denied to foreigners.

We should not be misled by the jurisprudence which, at first sight, gives an impression of a progressive protection. If the administrative justice does not categorically refuse to deal with deportations, it is only to preserve the rationality and equality of law. When the *Conseil d'Etat* (highest administrative court) looks into a deportation order, the councillors always refuse to speak about the content. They only control the external legality of the act. Without ever saying they are unqualified, the administrative judges do not consider themselves to be concerned. We cannot consider that justice gains control over the administrative power<sup>24</sup>, when the deportation orders stop being considered as government acts<sup>25</sup>. This loss of jurisdictional immunity can actually be understood as part of a larger trend in the French administrative justice leading towards a better legal qualification of administrative acts. Deportation is only one of them: the stabilisation of a legal order—which republican public law attorneys such as Maurice Hauriou or Léon Duguit envision as positive and global—go through reclassification in administrative acts and are therefore subjects to the control of legality. Likewise, considering Michel Morphy's judgement (*Conseil d'Etat*, 14 March 1884) as an important step because it grants the criminal judge the right to determine the legal status of a deportation order results from a lack of

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<sup>24</sup>Stéphane Duroy, "Le contrôle juridictionnel des mesures de police relatives aux étrangers sous la troisième République", in Maurice Claude Blanc-Chaléard et alii, *Police et migrants. France, 1667-1939*, Rennes, PUR, 2001, p. 91-104.

<sup>25</sup>Judgments Naundorf from 2 August 1836 and Solms, 8 December 1853; case-law later confirmed at the beginning of the Third Republic.

contextualisation. Such a judgement is strictly consistent with the global evolution of French administrative law, which grants the ordinary judge the right to establish the external legality of an administrative act without however being allowed to express himself about the motives<sup>26</sup>. As far as jurisdictional control is concerned, once it is placed in the wider context of public law evolution, the timidity of the administrative judge towards deportation is striking. As of 1900, the administrative justice experiences an intense doctrinal and jurisdictional activity leading towards a limitation and a control of the administration<sup>27</sup>, making the *Conseil d'état* responsible for a legal order based on legal guarantees. On the contrary, administrative acts regarding foreigners mostly remain outside this jurisdictional control<sup>28</sup>. Deported foreigners belong to these “cases in which the governmental and administrative authority is not bound, under efficient sentences, to respect individual rights and legality” as the subtitle of Jean Cruet’s book suggests<sup>29</sup>. If he acknowledges the theoretical possibility of reviewing a ministerial deportation order on the grounds of abuse of authority, he immediately considers that it “is not likely to lead to an invalidation”<sup>30</sup>. Most of the time, criminal judges and administrative judges only invalidate deportations of French individuals being wrongly deported (as they are not foreigners<sup>31</sup>) and it is materially impossible to have a deportation against a foreigner invalidated, regardless of personal circumstances.

The complete predominance of the Administration did not happen without oppositions and deportations very soon became the subject of animated debates. As of 1882, the radicals decided to lead a campaign against administrative deportation, some demanding for it to be abrogated and others modified<sup>32</sup>. If some bills supported by the socialists still defend a strictly humanist rhetoric<sup>33</sup>, criticism heard at the *Chambre des*

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<sup>26</sup>Grégoire Bigot, *Introduction historique au droit administratif depuis 1789*, Paris, Presses universitaires de France, 2002, p. 202.

<sup>27</sup>On the progress of administrative justice, see Nicolas Rousselier, *La force de gouverner. Le pouvoir exécutif en France XIXe-XXIe siècle*, Paris, Gallimard, 2015, pp. 173-228.

<sup>28</sup>M.-J. Redor, *De l'Etat légal à l'Etat de droit. L'évolution des conceptions de la doctrine publiciste française, 1879-1914*, Paris, Economica, 1992.

<sup>29</sup>Jean Cruet, *Etude juridique de l'arbitraire gouvernemental et administratif*, Paris, A. Rousseau, 1906

<sup>30</sup>Jean Cruet, *op. cit.*, p. 82.

<sup>31</sup>Robert Cugnin, *L'expulsion des étrangers*, law thesis, University of Nancy, 1912, pp. 36-41.

<sup>32</sup>On this issue, see Gérard Noiriel, *Immigration, antisémitisme et racisme en France*, Paris, Pluriel, 2009, p. 162-165; on the Goblet-Humbert and Naquet projects, see *Chambre des députés, Débats parlementaires – documents*, 1935, p. 372 et 485; for the debates, see *Chambre des députés, Journal officiel : les débats*, 1882, sessions from 10 and 12 May 1882.

<sup>33</sup>See for example, the proposition from the socialist group, *Chambre des députés, Débats parlementaires – documents*, annexe n° 1438, session from 14 January 1904, p. 22; Vaillant makes the same kind of proposition to the *Conseil de Paris*.

*députés* mainly comes from jurists who are alarmed by the arbitrariness and demand the transfer of deportation decisions to the legal power<sup>34</sup>, or at least a precise legislation of the motives leading to deportation<sup>35</sup>. Beyond their differences, all these reforms attempt to establish through the law a legal status specific to foreigners, even if none of them manages to reach this goal.

The jurists' failure to be granted a right to examine or to control the main decision that, at that time, can be taken by the administration against a migrant leaves the foreigners, as a legal category, in an awkward situation. Unable to benefit from the legal guarantees of the law, the foreigners have to face alone the State's historical logic of sovereignty and domination, at a time when its capacity to act is reinforced. This remark goes beyond the simple legal abstraction as it places immigration under the sovereign power of an "organisational State" with no internal limitations. Only external limitations created by the bilateral conventions allow several punctual adjustments of civil-law<sup>36</sup>. The "appearance of a labour policy"<sup>37</sup> during the First World War and the transition from a declaration-based to an authorisation-based system<sup>38</sup> certainly owe a lot to the handling of the migratory question in terms of sovereignty only around 1900. The posterity of this evolution led to migration controls now being sometimes qualified as "the last bastion of sovereignty"<sup>39</sup> but the difference is drastic compared to the 19<sup>th</sup> century, when the State only accomplished *a posteriori* police missions.

The foreigners, who became actual administration objects, end up being subject mainly to decrees, a kind of parallel legislation. More technical, more flexible and more reactive, they were booming at the time<sup>40</sup> and were considered by Cruet as the "legislative power of the Government". Thus, it is through circulars that the administration orders the actions of its services, for example demanding the registering

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<sup>34</sup>See the bill proposed by Flourens, *Chambre des députés, Débats parlementaires – documents*, 1901, session from 25 January 1901, annexe n°1461, pp. 49-50.

<sup>35</sup>Jurists, in particular private international law specialists, often request such legislation; see Jean Cruet, *op. cit.*, p. 84.

<sup>36</sup>Philippe Rygiel, *Une impossible tâche ? L'institut de droit international et la régulation des migrations internationales : 1870-1920*, Habilitation essay, Paris 1, 2011, available online: <https://hal.archives-ouvertes.fr/tel-00657654/PDF/IDIMIG.pdf>.

<sup>37</sup>Vincent Viet, *Le cheminement des structures administrative set la politique française de l'immigration (1914-1986)*, Research report for the DPM, the FAS and the MIRE, 1996, pp. 20-26.

<sup>38</sup>Danièle Lochak, "Police et travail. Aux origines de l'ordonnance du 2 novembre 1945", *Plein Droit* n° 29-30, Novembre 1995, pp. 31-32.

<sup>39</sup>Catherine Dauvergne, "Migration and the Rule of Law in Global Times", *The Modern Law Review*, vol. 67, issue 4, July 2004, pp. 588-615; quoted by Philippe Rygiel, *Une impossible tâche ?*, *op. cit.*, p. 6.

<sup>40</sup>Nicolas Rousselier, *La force de gouverner...*, *op. cit.*, pp. 208-210.

of foreigners to be updated, at a time when international tensions threaten an imminent war. The sudden increase of condemnations for infractions to the 1893 law in 1913 is thus symptomatic of a certain way for the State to handle the problem. The non-national individual is a potential threat and it is important to at least know where they are. This crime that only led to 1,000 condemnations a year in 1906 (92 condemned individuals for 100,000 foreigners) suddenly became one of the five top crimes (550 condemned individuals for 100,000 foreigners). And this way criminal courts suddenly became auxiliaries for the registering.

The First World War and its experience of the State's strong interventionism and of the national category's hyper-legitimacy finalise the empowerment of the foreigners' category. Whereas until then the images of the vagrant and the foreigner were confused, between 1914 and 1940 they become very different. Before the war, foreigners were proportionally much more often the victims of the repression of vagrancy and begging than the French; at the end of the 1930's, the difference is much lower, when it has not simply disappeared as for begging sentences (fig. 6). Simultaneously, the function of deportation definitely changes: from a tool mostly intended to deal with foreign vagrants, it becomes a practical instrument to manage the labour reserves, which explains the clear increase in the condemnations for infraction to a deportation order as of 1925 (fig. 1). To the deportations for moral undesirability are added the deportations for "economic undesirability motives" explains William Oualid<sup>41</sup>. Of course, the arbitrariness and lack of actual motives are not new but the phenomenon seems to take such a new extent that deportation reform is the subject of an important bill in 1935. Testimony of this legal empowerment of the foreigner within the common law, several laws specific to them —completed by circulars and decrees—are voted to increase the control of a population now considered as a whole. Even the 1927 law that seems liberal at first glance leaves a great place for arbitrariness to the administration concerning naturalisation.

These legal evolutions organise the regime based on authorisation and give legal justice a role of control and sentencing for unwanted migrants. It no longer only condemns those considered recidivists (individuals guilty of an infraction to a deportation order), it also bans unauthorised migrants. The cursor of undesirability has

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<sup>41</sup> W. Oualid, *Les cahiers du renouveau*, February 1935, n°3.

moved considerably since the mid-1920's. The repression of the 1893 law clearly changes direction by condemning for the first time a significant number of defendants to imprisonment (fig. 2). Right after the war, in 1920-1921, is the time of an increased repression of infractions to this law in order to deal with the strong foreign presence during an economic crisis: in 1921, almost 14,000 fine condemnations are pronounced by the French *tribunaux correctionnels* (900 condemned individuals for 100,000 foreigners). The State regaining control goes beyond a simple prompting to respect a strategic legislation during a time of demobilisation: in 1922, for the first time and despite a clear drop in the number of defendants, massive condemnations to imprisonment for administrative crimes related to stay on the French territory are pronounced: more than 20% of condemned individuals in 1922 and 1923 are sent to prison, even if it is for really short durations (less than 6 days).

It obviously moderates Ralf Schor's judgment that the government was simply closing the borders for a while without doing anything against the foreigners already on the territory<sup>42</sup>. They actually did something, using the repressive aspect of criminal justice without considering its educational function. Still quite important during the 1890's, it clearly diminishes after the First World War as shown by the large drop in mitigating circumstances granted for infractions to a deportation order and to the 1893 law<sup>43</sup>. Another hint of this new tension during the years 1924-1927, a period during which the public opinion is highly concerned by the question of foreigners' criminality<sup>44</sup>, is the percentage of recidivists among the defendants for infraction to a deportation order that clearly diminishes after the war, which means that more first-time offenders are taken to court. As of 1926, the annual rate stabilises around 60% whereas before the war recidivists represented 85% of defendants in average.

The economic crisis, which hits France with some delay in 1931, worsens this phenomenon. It has been impossible to locate it in the archives, but only the issuing of circulars can explain that as of 1931 the repression of the 11 August 1926 law about the employment of foreign labour experiences such a leap (fig. 7). Mainly intended for French employers who are not respecting the administrative prerogative of

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<sup>42</sup> Ralf Schor, *L'opinion française et les étrangers en France (1919-1939)*, Paris, Publications de la Sorbonne, 1985, p. 83.

<sup>43</sup> On average, between 1893 and 1913, mitigating circumstances are granted to 67% of individuals condemned for an infraction to the 1893 law; but only to 47% between 1919 and 1932.

<sup>44</sup> Ralf Schor, *op. cit.*, 4<sup>th</sup> part.

authorisation, this law leads to a repression that in the end does not really impact foreigners as they only represent around 20% of the defendants, which corresponds to employers of foreign nationalities who illegally employ compatriots or members of their families. When the repression of an infraction becomes a political priority, police forces and public prosecutor departments are clearly involved. Despite the institutional independence of courts, it should be noted that the rhythm of condemnations of this crime exactly corresponds with the three periods of increased hostility towards foreigners: 1931, 1934-1935 and 1938.

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*1930's: between the instauration of an "exceptional common law" and the feeble opposition of an increasingly manipulated justice*

In the 1930's, this old trend is confirmed and clearly worsened by the new institutional place taken by the executive power and the publication of decrees. Public law attorneys do not hesitate to support that evolution with their doctrine, starting a vast reinstatement of the executive power and criticism of the legal dogma of representation. Boris Mirkine-Guetzévitch thus publicly defends the constitutionality of decree-laws, tools he thinks efficient to avoid the flaws of a strictly parliamentary regime<sup>45</sup>. A lot of jurists, who sympathise with the efficiency argument, propose more advanced collaborations between justice and administration, such as Xavier Barthélémy who finishes his law thesis with the traditional *legiferenda* essay, suggesting that the public prosecutor departments actively cooperate with the prefectures<sup>46</sup>. The blurring of borders between justice and administration is typical of that period, during which some governments try to control immigration thanks to legal repression<sup>47</sup>. Much more than in the past, legal repression is used to support the migratory choices made by the government and consequently the legal arsenal grows significantly during these years. The 30 October 1935 decree-law, enacted in a context marked by the Stavisky case and Louis Barthou's murder, does not only worsen the

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<sup>45</sup>Stéphane Pinon, *Les réformistes constitutionnels des années trente : aux origines de la Ve République*, Paris, LGDJ, 2003.

<sup>46</sup>Xavier Barthélémy, *op. cit.*, pp. 264-271.

<sup>47</sup>Julie A. Dowling and Jonathan Xavier Inda, *Governing Immigration Through Crime: A Reader*, Stanford University Press, 2013, p. 16.

sentence for infractions to a deportation order (the sentences are now 6 months to 2 years of imprisonment), it also lists legally reprehensible behaviours such as false statements and the forging of identity documents. The 2 May 1938 Daladier decree-law about foreign police, the explanatory statement of which clearly establishes a bond between the presence of foreigners on the territory and the protection of public order goes even further: again, the inflexibility of repression is increased and new dispositions are made. In particular, it is decided that the application of mitigating circumstances and suspended sentences will be adjourned, whereas repeat offence of an infraction to a deportation order can lead to banishment.

That measure is not unprecedented as it had been used before in tax-related cases but it nevertheless completely denies the principle of individuation that was considered by all jurists at that time as the great modern legal progress. The law concerning foreigners tends to gain more autonomy: without actually being outside the legal order, they are subject to what we could call an “exceptional common law”. Without being derogatory from the common law in the strict sense of the term, it obviously organises a worsened repressive regime.

Only in charge of the registering and implementing of an already pronounced sentence, the magistrates did not submit themselves to the government's will so easily. Of course, without these injunctions, it is impossible to understand why the repression of infractions to the 1893 law suddenly becomes more severe than ever. Whereas the courts were judging only a little more than 400 defendants in 1937, they are more than 8,000 accused in 1938. In particular, 75% of condemned individuals are sentenced to imprisonment for a crime for which imprisonment was a more commonly used sentence since the war but had never been used so much (fig. 2).

Curiously, the repression of an infraction to a deportation order offers a very different image. The number of condemnations suddenly decreases (fig. 1) whereas the percentage of recidivists drops to 12% (compared with 64% in 1937). It is difficult to interpret figures the reliability of which can be questioned but we can imagine that the police tolerance threshold dropped strongly because of the offensive lead by Daladier's government, thus bringing an always increasing number of first-time offenders. On the other hand, the decrease in the number of cases could be explained by cases being closed by the public prosecutor department, thus avoiding the audience during which the judges' activities are too limited by the formulation of decree-laws. In any case, it

seems that the magistrate displayed some inertia. The acquittals regarding the 1893 law suddenly boomed in 1938: between 2 and 4% of defendants were usually found not guilty but all of a sudden, in 1938, almost 11% of the defendants are acquitted. These figures corroborate the opinion of legal professionals who, happily or regretfully, report the disobedience of magistrates. Gaston Prunier, for example, a young public law attorney who defended his law thesis in 1944, considers “that the courts do not always respect the planned minimum sentences, especially per the 2 and 16 May 1938 decrees. [...] A kind of whim is displayed in this field, he adds. Some foreigners without any identity document have been condemned to 8 days of imprisonment whereas the minimum required by the aforementioned decrees is a month”<sup>48</sup>. Whim? Or an opposition to measures considered prejudicial to the fundamental freedom of justice? The second interpretation would explain the apparent nonsense of the suspended sentences’ percentage skyrocketing in 1938 to reach 15% of defendants compared to only 1,2% the preceding year, whereas the law forbade the use of the suspended sentences. As soon as the Daladier government collapsed, unanimous protests were heard at the Chamber and a lot of representatives regretted such a confusion of roles. Even Paul Marchandau, Minister of Justice under the latest Daladier government, explains during the discussion about an amnesty law in June 1939 that a new text that would “moderate [...] the inflexibility of a regime established by the May 1938 decree” was necessary, considering the then pronounced imprisonment sentences as “highly appalling”<sup>49</sup>.

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The legal judgement, both a quantifiable social fact and a unique event in an individual’s private life, hints at the inflexions in the application of migratory policies beyond legislative stabilities. In the 19<sup>th</sup> century, immigration offenses have a mainly *ex post* immigration regulatory function, mostly punishing vagrants and beggars, whose integration is considered a failure. The apparition of specific foreigner measures at the end of the 1880’s, the non-respect of which soon leads to a trial in a *tribunal correctionnel*, does not however fundamentally change the “repressive regime”

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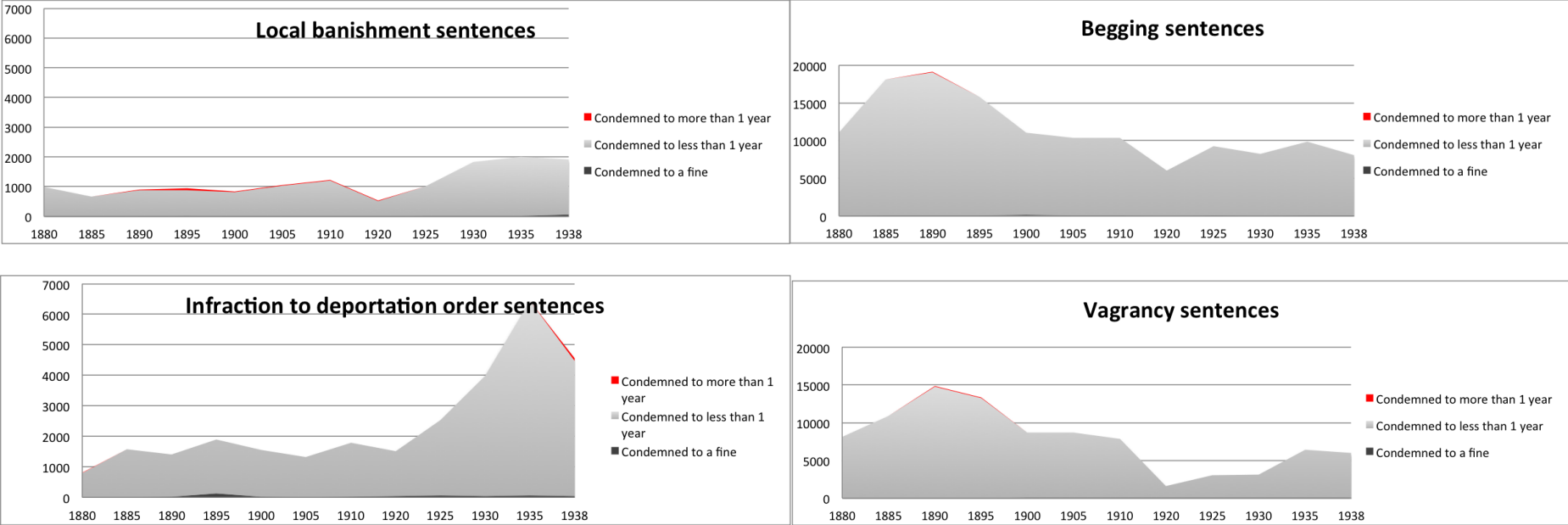
<sup>48</sup> Gaston Prunier, *L’accès, le séjour et la circulation des étrangers en France*, law thesis, Clermont, 1944, p. 77.

<sup>49</sup> *Chambre des députés, Journal officiel – les débats*, 1939, pp. 1523-1524.

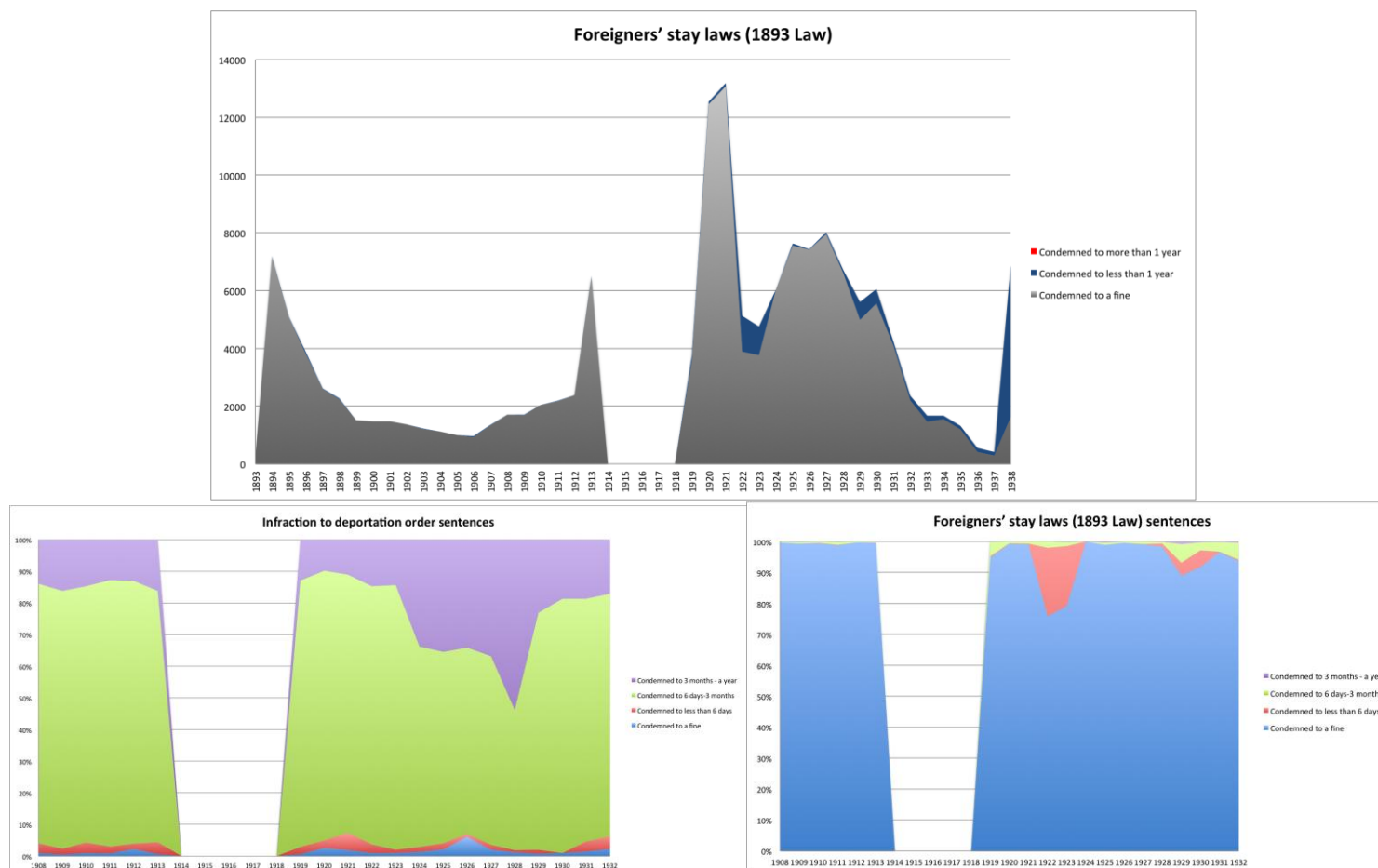


inherited from the 19<sup>th</sup> century. The discrepancy appearing during the 1880's-1890's is less related to repression than to legal order. Immigration becomes a question strictly related to the sovereign power and falls under the administration's jurisdiction only, without any legal guarantees. This gradual empowerment of foreigners as a legal category, following a process neither unquestioned nor linear, finally leads to the 1938 decree-laws. These decree-laws designed a worsened repressive regime towards foreigners deemed "undesirable" and therefore created a specific law for foreigners which is not being derogatory from the common law in the strict sense of the term but could be labelled as an "exceptional common law". The blurring of borders within the political order that can be seen in 1938 shows how justice can be at the boundary between the law that ties and limits power and the concrete wielding of the State's strength. Justice is complex and very ambivalent and cannot be limited to the sole question of power. On the contrary, it raises questions about the agents' role in the effective application of the law but even more so about the authorities' ability to impose and to ensure the acceptance of a restrictive legal status.

*Fig. 1: Structures of sentences for movement infraction (1880-1938)*



*Fig. 2 : Structure of sentences for the infractions to foreigners' stay laws (1880-1938)<sup>50</sup>*



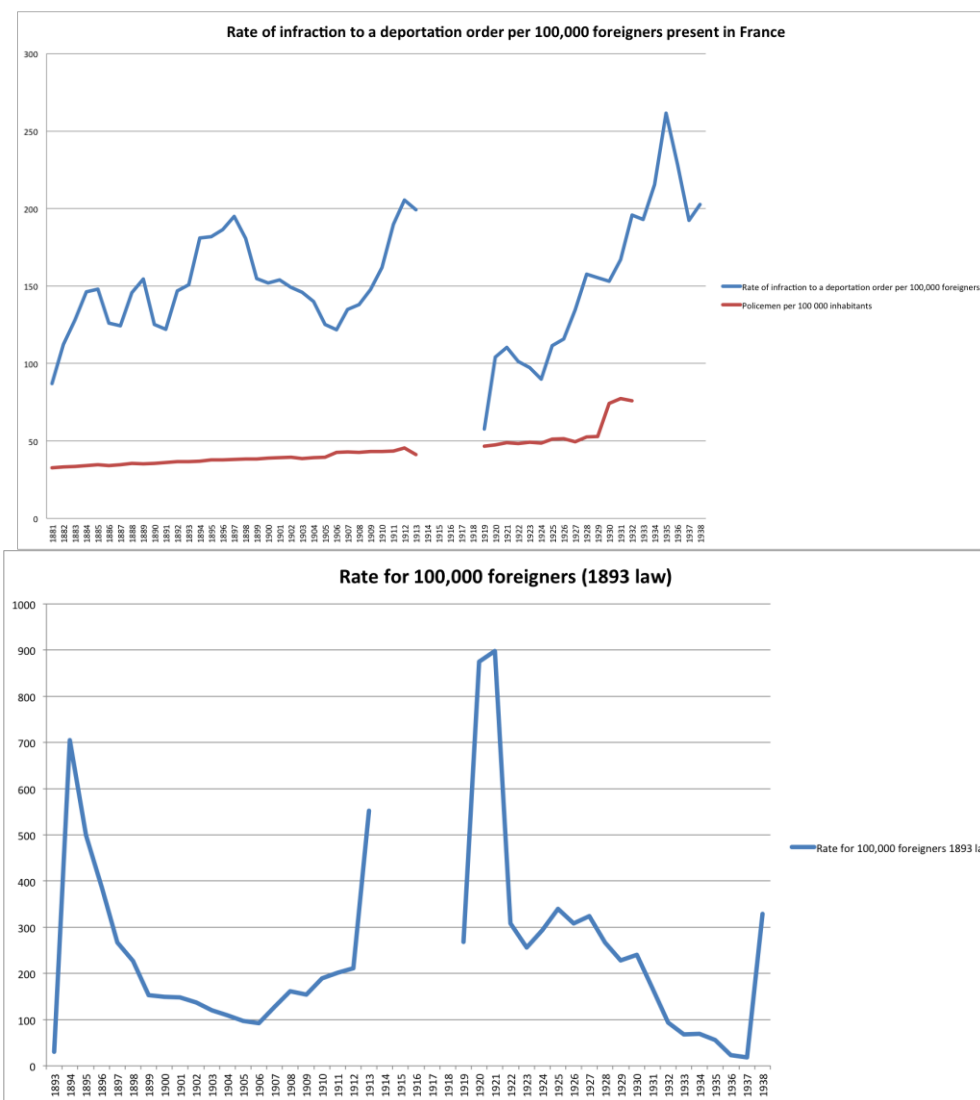
<sup>50</sup> Graphs by zones only concern the years 1908-1932, because of the breakdown chosen by the *Comptegénéral's* authors.

*Fig. 3: Rate per 100,000 inhabitants of defendants for vagrancy and infraction to a deportation order (1905-1938)<sup>51</sup>*

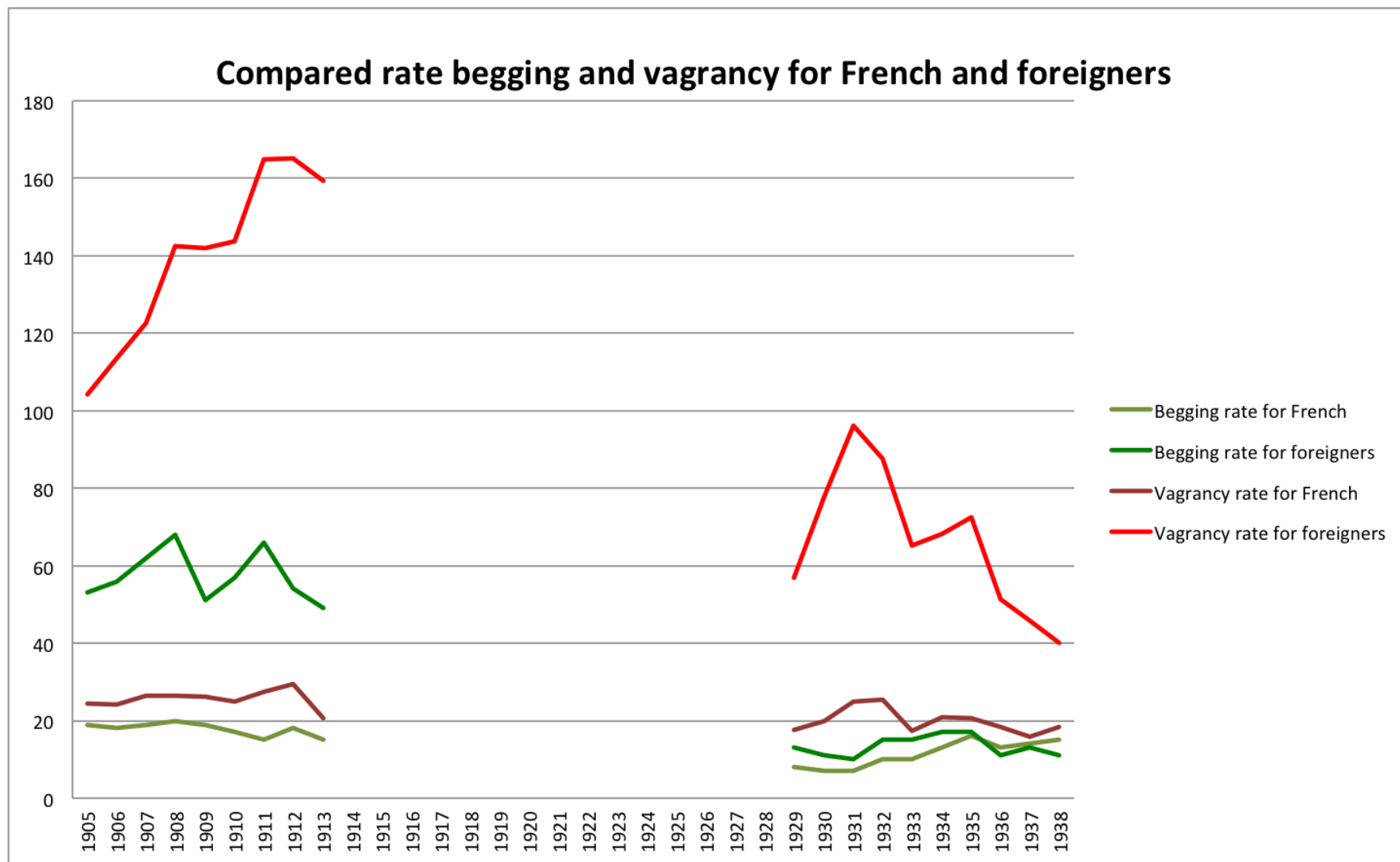


<sup>51</sup> The number of defendants by nationality is compared to the number of French or foreigners on the territory at the time of the five-yearly census. To obtain an annual rate, the population numbers for between-census years have been interpolated thanks to Lagrange polynomials. The data differentiating the French from foreigners for each crime is only available for the periods 1905-1913 and 1929-1938.

*Fig. 4 and 5: rate of infractions to a deportation order (1880-1938) and rate for the infractions to the 1893 law (1893-1938)*



*Fig. 6: compared rate for the nationality of people condemned for begging and vagrancy (1905-1913 and 1929-1938)*



*Fig. 7: defendants for an infraction to the 1926 law on the employment of foreign workforce (1926-1938)*

