

The Courts and Immigration

by Michael Curtis



A spectre is haunting the United States and Europe, the spectre of immigration. It will not dissolve until the political and judicial systems of those countries enter into a holy alliance to exorcize it. The issue arouses fervent passion that frustrates the fulfillment of Article 3 of the 1957 Treaty of Rome which call for the abolition, as between member states of the European Union, of obstacles to the free movement of persons as well of goods, services, and capital.

Since the political systems, executive and legislative, have been unable to find a solution, the judicial branch in the U.S. and in France is entering the "political thicket" attempting to bring order to part of the existing chaos concerned with immigration issues. In the U.S. this is occurring despite the warning of Justice Felix Frankfurter in *Colegrave v. Green*, decided 4-3 in 1946, that courts should not enter the thicket, in that case the drawing of electoral maps.

First, the thicket in France. Landmark court decisions are infrequent. One is the ruling by the French Constitutional Court on July 6, 2018 that the "principle of fraternity" protected an individual from prosecution for helping migrants enter France illegally. The case concerned an olive farmer named Cedric Herrou who in the Roya Valley in South-East France, a left-wing bastion whose citizens oppose what they consider inhumane treatment of migrants, held it was his civic duty to provide food, aid, and shelter for illegal migrants. His farm is close to the Italian border, not far from the town of Ventimiglia, and he had hosted more than 2,500 migrants over the last two years.

The Court used the principle of fraternity, one of the three values of the national motto, "liberty, equality, fraternity," to rule that it confers the freedom to help others. It held that any act of aid provided for humanitarian purposes, regardless of the legal status of the persons being helped, could not be punished.

In 2015 the French government was concerned, as all European were, about the flow of people arriving illegally and imposed border controls. Helping illegal immigrants entering or remaining in the country could be punished by a prison term of five years and a fine of 30,000 euros. However, in January 2018 a French court acquitted an individual who had faced a six month suspended prison term for aiding illegal Eritrean migrants.

The farmer M. Herrou in August 2017 was fined 3,000 euros and given a four month suspended sentence for providing assistance to 200 illegal migrants entering from Italy and sheltering them. He appealed successfully. The decision of the FCC is interesting for various reasons. It implies that illegal immigration is legitimate, or at least should not be punished. The decision may lead to political problems and further obligations in France and in the rest of the EU, by allowing a more permissive view of immigration, which is opposed by a

considerable number of French and Europeans. Legally, it implies that "fraternity," the least mentioned and regarded of the national trio motto, and the most nebulous as a moral concept, has constitutional force by which authorities must abide.

The word "fraternity," was not included in the revolutionary 1789 Declaration of the Rights of Man, though liberty and equality were mentioned. Curiously, it was Maximilien Robespierre, variously viewed as either a tyrant or as the "incorruptible," who in a speech on December 5, 1790 on the organization of the National Guard first introduced a proposal that the trio be written on French uniforms and flags, but his proposal was rejected by the legislature. "Fraternity" was in the draft of the 1848 constitution, defined as a principle of the Republic, inscribed in public buildings, and appeared again in the Third Republic.

During World War II the national motto was replaced by the Vichy trinity, "*travail, famille, patrie*," work, family, fatherland, but it was restored in the constitutions of 1946 and 1958. Article 2 of the present, amended, 1958 French Constitution declares that "The maxim of the Republic shall be liberty, equality, fraternity."

But fraternity is not the maxim of the European Union whose members are seriously divided on the immigration issue. On June 29, 2018 the EU announced they had reached agreement on the immigration issue on four main areas. The countries would share the burden of accepting refugees; they would set up "controlled centers" to accommodate them; they would set up "regional disembarkation platforms" to process migrants outside of Europe; they would strengthen external borders.

Yet, the agreement remains uncertain and unfraternal. The immediate problem is that these four concepts are unclear and difficult to implement. It is evident that no country, Libya, Algeria, Morocco, or Albania, wants to host the regional

disembarkation platforms, meant to deter crossings in the Mediterranean so that migrants could stay in them.

Equally, the EU, in political crisis, is divided on control centers in which supposedly a distinction would be swiftly made between illegal migrants to be deported, and legitimate asylum seekers who would be distributed among EU countries.

Matteo Salvini, leader of the League party and deputy prime minister in Italy, has declared his country will not authorize disembarkation from rescue vessels or allow the migrants to enter Italian ports, and the four power Visegrad group (Poland, Hungary, Czech Republic, and Slovakia) do not want to accept refugees.

French President Emmanuel Macron has declared that France will not open reception centers for migrants who arrive in Europe "because France is not a country in which migrants arrive first." For him, "controlled centers" must be set up in countries where migrants land, such as Italy, Spain, or Greece. German Chancellor Angela Merkel on July 3, 2018 was obliged to change policy and agree to tighten border controls. Spain turned away a vessel containing 250 African migrants.

Can the European experience and court decision help the U.S. deal with the immigration issue? President Donald Trump in June 2018 tweeted immigration laws are "the dumbest anywhere in the world," and emphasized that people should not come into the U.S. illegally. The solution was for people not to come to the country illegally. On this he has urged "zero tolerance," particularly regarding illegal immigrants from Mexico and Central America. To this end the Trump administration began criminal prosecution of all crossing the border illegally from Mexico. This led to separating children from their parents. The administration policy was greeted with opposition, and was forced to change; President Trump signed an executive order that families be kept together.

The issue is not new. In 2014 President Barack Obama's administration had detained families trying to enter from Central America believing this might deter others, but had to reverse policy because of political opposition. Legally, the issue concerns the Flores settlement of 1997 that the U.S. government must release children from immigration detention to parents or other relatives. Jenny Flores was a El Salvador immigrant who had crossed the Mexican border and at age 15 was tried in 1985. The court decision was to prevent children from being held indefinitely in immigration prison.

The Trump policy, referring for criminal prosecution all who crossed the border illegally which led to separation of children from parents, therefore challenged Flores. The administration asked Federal Judge Dolly Gee, Central District California, to modify legal rules and allow families that entered the U.S. illegally to be held together. Gee had ruled in 2015 that immigrant children should not be held for long periods, no longer than 20 days, even with their parents. They should be released as quickly as possible. She was critical of the Obama administration for holding children in "widespread and deplorable conditions." On July 9, 2018 Judge Gee, a Chinese-American herself, the daughter of immigrants, declared that the administration's request was a cynical attempt to shift immigration policy making to the courts.

She ruled that the president cannot scrap the 20 year legal rule regarding children in immigration jails. Even more important she was critical of both the President's "ill considered " action, and the failure of Congress to address the issue. She held that over 20 years of congressional inaction and ill-considered executive action have led to the current stalemate.

Irrespective of the complex legal issues concerning illegal immigration, and the sad sight of children being separated from families, the injunction of Gee in the U.S. court is clear. Congress must solve the issue, not the courts.