The ‘crime of solidarity’ On the symbolism and the political message behind Court rulings

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Imagine yourself driving home and suddenly you come across a human being in direct need of help in terms of shelter, food, clothes, etc. Would you expect to be arrested and punished by your government for helping this individual?

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In the heated context of the European migration ‘crisis’ that, in certain places like the infamous ‘jungle of Calais’ becomes a humanitarian crisis, the judicial treatment of the solidarity action of activists and local residents in France is worth a closer look. Two recent rulings by the Court of Appeal in Aix-en-Provence, France, reopened the debate on article L-622-1 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA). This article has been unofficially renamed the ‘*délit de solidarité*’ (crime of solidarity). Farmer and activist Cédric Herrou and engineer researcher Pierre-Alain Mannoni were sentenced to imprisonment with suspension of penalty for the facilitation of entry, movement and residence of individuals in an irregular situation (CA Aix-en-Provence, August 8, 2017, no. 2017/568 and CA Aix-en-Provence, September 11, 2017, no. 2017/628). The two cases received a great deal of media attention, stirring up much public and political debate. This blog aims to shed light on the content of the ‘crime of solidarity’ by discussing its origin, the two rulings and the resulting debate.

What’s in a name?

Of course, there is no such thing in French Law as a ‘crime of solidarity’, France would never jeopardise its reputation as ‘the country of human rights’. However, the provision of the CESEDA, in its actual form, criminalises the (attempted) direct or indirect facilitation of ‘*the entry, movement and residence of individuals in an irregular situation in France*’. This ‘crime’ is

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punishable with a prison sentence of up to 5 years and a fine of 30,000 euros. The currently used denomination 'crime of solidarity' was created in the 1990s by an activist group to raise awareness of the fact that the provision could be used to sue and sanction anyone who provides selfless help to individuals in an irregular situation (illegal migrants, asylum seekers, refugees, etc.) (Slama, 2017). The provision is a clear example of the merging of crime control and migration control, a development which has also been referred to using the term *crimmigration* (e.g. Stumpf 2006, Woude et al., 2017).

Prison = crime – a few words on the facts

In order to fully understand the problematic nature of the Court decisions, it is necessary to have some factual information on the two cases. Even though similarities can be observed, the two men engaged in different activities. On the one hand, the devoted and renowned pro-immigrant activist Herrou (see New York Times, 2017) carried out multiple trips transporting migrants (more than 100 individuals) from the Italian city of Ventimiglia to his home (in France) and to an abandoned building of the French national railway that he transformed into a shelter. On the other hand, the researcher Mannoni took three Eritrean woman who were already in France in his car, to give them shelter in his home for one night before driving them to a train station so they could reach an NGO in Marseille (CA Aix-en-Provence, August 8, 2017, no. 2017/568 and CA Aix-en-Provence, September 11, 2017, no. 2017/628 and le Monde, 2017).

It's all about the place

Both cases took place in the 'Roya Valley' at the Italian-French border, sometimes renamed the 'Rebel Valley' by the press due to the organised action of residents and activists to help irregular migrants. In 2015, France closed its border with Italy and considerably reinforced its border controls in this zone. The mass arrival of migrants in the Italian city of Ventimiglia, seen by many migrants coming from the Mediterranean Sea as the ultimate gateway to Europe, triggered this reintroduction of border controls. With a tough stance on migration issues, the French government wanted to reassure the public in the run up to regional elections. With the anti-immigrant, far-right political party "Front National" forming a concrete threat in the region, a tough stance against migration seemed necessary (de Wenden, 2015). As a result, this border zone is now a place of tension between the authorities, the migrants in difficult living conditions (see MSF, 2017), the local communities and the activists helping migrants (Liberation, 2017).

De l'esprit des lois

The work of several French scholars on the evolution and modification of the so-called 'crime of solidary' is of primary importance to analyse the current interpretation of the provision by the Court of Appeal of Aix-en-Provence. In simple terms, why was this provision originally created and who is targeted by it? Scholars demonstrated that since 1938 and until 1994, the provision aimed *only* to punish organised networks that take advantage *for profit* of vulnerable individuals in an irregular situation (Ferran, 2010). Three key moments should be highlighted:

In 1994, the Schengen Convention required the Member States to impose sanctions on 'anyone who helps *for profit* an irregular migrant to enter or stay in a territory of a State parts of the Schengen area (art. 27). Again, it is only profit-oriented behaviour that is targeted. Nevertheless, the French legislature did not make this distinction in the phrasing of the provision. Indeed, the government wanted to target non-profit behaviour that could be related to the infiltration in France of Islamic, terrorist or espionage networks (Slama, 2017). At that time, senator Francoise Seligmann expressed her concerns about the potential risk of using this provision against individuals helping irregular migrant 'by friendship or simply because it's normal' (Lochak, 2013).

The Minister of Justice at the time reassured everyone stating that the provision would not be used against 'individuals who do not have the intention of violating the law and only want to assist people in turmoil'.

In 2002, the EU Directive 2002/90/CE defining the facilitation of unauthorised entry, transit and residence replaced the above-mentioned provision and required that the Member States imposed appropriate sanctions on individuals for the facilitation of irregular entry (art. 1. 1)a) and for the assistance of irregular residence (art. 1. 1)b). However, the EU legislature made a clear distinction between these two actions by adding the "for profit" requirement for the assistance of irregular residence. In simple terms, the facilitation should always be sanctioned whether it is for profit or not, while the assistance of irregular residence should *only* be sanctioned when it is done "for profit". The Directive also states that the Member States can decide not to impose any sanction (for facilitation of irregular entry) if the assistance is provided with a humanitarian goal (art.1.2). If the Member States wish to insert this optional humanitarian clause, they can '*apply their national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned*'. It is fair to say that the European legislature provides the Member States substantial room to manoeuvre in this specific case. Neither the 'for profit' requirement in the case of the assistance of irregular residence, nor the humanitarian clause for the facilitation of irregular entry as mentioned in art. 1.2. of the Directive was introduced by the French legislature who wanted to preserve the effectiveness of the law (Carrère and Baudet, 2004).

In academic circles, many cases have been highlighted to prove how this provision has in fact been used along the years to repress and intimidate members of civil society organisations or private individuals (e.g. the arrest of members of the Emmaüs community under Chirac and Sarkozy, police custody of activists and residents in Calais in 2003 and 2009). As Lochak noted (2013), Seligmann's concerns were justified. In response to the numerous controversies, the Socialist Party in 2012 promised to get rid of the 'crime of solidarity' once in power.

Instead of getting rid of the provision, in 2012 the Socialist Minister Valls expanded the existing familial immunity clause that prevents punishment if the help is provided by specific pre-determined relatives and created the humanitarian clause (Slama, 2017). As drafted by the French legislature, the latter entails that an individual will no longer be prosecuted 'when his/her act did not give place to *any direct or indirect consideration* and is *limited* to providing legal advice or to provide catering/hosting/medical services *that ensure* dignified and decent living conditions of the alien *or* are made to preserve the dignity and the physical integrity of the alien'(L-622-4 CESESDA). The word consideration refers to the word "*contrepartie*" in the French language. The latter can be define as something (in a broad sense, as the legislature did not specify the content of the consideration) that you provide in exchange, to compensate, for something else (a service/ a good/ etc.).

Houdini on the 'crime of solidarity'?

In light of the two above-mentioned cases, and other less prominent incidents in the media of the same nature in the same region and in Calais, it is clear that the humanitarian clause did not trump the 'crime of solidarity' in French Law. As scholars and members of civil society predicted, this humanitarian clause is not sufficient to protect the 'selfless help' provided by activists or individuals. The accumulation of the three above-mentioned conditions, the fact that the clause only applies to the facilitation of unauthorised residence (therefore not the transportation within the French territory), and the room for the interpretation of the terms 'direct or indirect consideration' afforded to judges are creating significant obstacles to be covered by the immunity.

In the cases of Herrou and Mannoni, which as illustrated above, differ substantially in terms of facts, the Court of Appeal of Aix-en-Provence surprisingly adopted a similar interpretation on the humanitarian clause. The concrete proof of the difference between the two cases is that Mannoni benefited from the humanitarian immunity in first instance (TGI Nice) while Herrou was convicted (see Slama, 2017). The criminal court in Nice considered that Mannoni's action was limited to sheltering three women exhausted by harsh living conditions and for that reason he had to transport them in his car for 70 kilometres. Therefore, he should not be convicted for his action (TGI Nice, 6 January 2017, no. 1693000004).

Nevertheless, in both cases, the Court of Appeal considered that the actions of both men were not limited to the conditions mentioned in article L-622-4, and generally speaking, were part of militant action intended to shield the control of the authorities. The positive side of the ruling was that the Court, in the same line as that of the criminal court of Nice declared that the humanitarian clause and its conditions should also apply to the situation of the facilitation of circulation and facilitation of irregular entry, which was not the case before. Based on this jurisprudence, the humanitarian clause is no longer limited to the facilitation of unauthorised residence.

On the message behind Court rulings

Reading between the lines, one question comes to mind: does 'militant action' constitute a form of direct or indirect consideration in the eyes of the Court? If so, is this interpretation in line with the spirit of the French and European legislature? To the latter question, the answer is no (see EU Directive 2002/90/CE – art. 1.2). Concerning the former, the statement of Minister Valls in 2012 is enlightening: '*Our law should not punish those who, in good faith, wish to give a helping hand*'. The aim was to make a clear-cut distinction between organised criminal networks and the selfless help of citizens or associations. Based on this statement, the answer in the case of the French legislator should also be negative. According to Lorant (2017), the principle of strict interpretation of criminal law is being trampled on. Indeed, while the Court acknowledges the fact that both men provided selfless help, the finality of their action is 'stigmatised' by the Court and prevents them from benefiting from the humanitarian clause. The author highlighted the confusion: '*either a militant action is a consideration, which is dismissed by the Court due to the possibility of having conflicting grounds, or the militant action prevents the application of the humanitarian clause, which is not written in the article*'. According to the author (2017), this part of the Court motivation '*seems to heed ideological considerations more than legal ones*'. One question remains, even if the 'militant action' prevented the application of the humanitarian clause, what constitutes 'militant action' in the eyes of the Court?

The problem therefore has its origins in the political spectrum. It is clear that pressure from French public opinion on immigration issues is strong and that France is in a difficult position with the current terrorist threats (e.g. Ifop, 2017). It is understandable that the Government wishes to avoid organised or semi-organised individuals or organisations helping individuals in an irregular situation crossing the border and leaving them on French soil without any control from the authorities. As the Court stated, the controls are necessary to apply the relevant immigration law. Nonetheless, the current drafting of the humanitarian clause with its strict conditions and the controversial interpretation given by the Court of Appeal of Aix-en-Provence are problematic. It is impossible to deny the political character of these rulings, particularly the one concerning Mannoni, and the message sent to citizens through them. Fassin (2017) reacted strongly on these rulings and expressed his concerns on how the '*judiciary is becoming the obedient tool of the executive*'. Many individuals, from residents living in border zones to activists, who in the first place would want to help individuals in an irregular situation following their moral values or ethics, will now think twice before

doing so. One should never underestimate the trauma caused by the idea of being taken into police custody, being prosecuted or risking a prosecution. All of this is highly confusing when publicly President Macron is encouraging a humanitarian approach to immigration, while his Minister of the Interior is embracing dissuasive immigration politics in order to decrease the migrant influx (Gemenne, 2017).

One thing is certain; a redrafting of the humanitarian clause of ‘crime of solidarity’ in accordance with the spirit of the French and European legislatures is necessary in order to enhance legal certainty and avoid unjust ‘political’ judicial rulings.

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