

By Aude de Coustin

## **Criminalisation of Solidarity in France: A General Overview**

Loan Torondel, a young volunteer of the association “L’auberge des migrants”, was found guilty of defamation and later on sentenced to a 1500 euros suspension fine in September 2018 by the tribunal of Boulogne-sur-Mer in France; because of a tweet, published in January, with a picture of policemen in Calais, suggesting that they were about to take the blankets away from migrants. This event may seem extreme, ridiculous or tragic but sadly it has become the norm for migrant helpers in France. Loan is not the first one being convicted for showing solidarity with refugees. Yet, the French government announced that solidarity is no longer a crime after adopting the new asylum law in August 2018. However, in reality, different legal frameworks are being used to intimidate, vilify and even sentence political activists, associative workers and volunteers, or simple citizens, who in their acts or in their speeches, defend the cause of migrants in France. The purpose of this article is to understand what does “offence of solidarity” mean in the legal French environment, and how it became such an important idea in the political narrative. This paper also aims to describe the consequences of this criminalisation by enhancing the state responses to migration and help at the French borders. Finally, two emblematic cases of criminalisation of solidarity will be discussed to make the bridge within civic mobilisation.

### **1. Is Solidarity a Legal Offense?**

#### **a. Genesis: A legal nuance that led to criminalization of solidarity**

Officially, the offense of solidarity does not exist in the French law as such. However, since the first introduction in 1938 of the offence of facilitating entry, movement or unauthorised residence of a foreign person in the French law; the legislation has evolved increasingly punishing anyone who aids strangers who entered French territory illegally. In the last three decades, there was an acceleration in the criminalisation of solidarity with a tightening of the existing law, but also the usage of various legal means in order to arrest or even condemn people showing solidarity.

On several occasions, in 1972, 1976 and 1991, penalties are introduced targeting people who assisted irregular migrants in movement or residency. However, the parliamentary debates suggest that the legislators mainly intended to sanction criminal networks organised for profit.

The Schengen Convention of June 19th, 1990 obliged Member States to “impose appropriate penalties on anyone who assists or attempts to assist a foreigner, for profit, to enter or reside in the territory of a State in the Schengen area”. However, the law enacted in 1994, to put French law into line, does not specify that the sanctions imposed - up to 5 years imprisonment and a fine of 200,000 francs – will only concern behaviours motivated by “profit-making purposes”. Individuals, whether acting for profit or not, who, being in France or in a State of the Schengen area, help a foreigner to enter or reside illegally in France or in another State of the Schengen area may therefore be prosecuted. Already at the time, the Minister of the Interior justified this means during the debates as a way of allowing the criminal prosecution “of acts which would,

for example, involve the infiltration into France of elements belonging to Islamist, terrorist or espionage networks".

Already in the early 1990s, this legal uncertainty around the concept of profit making created the possibility to invoke the offence of aiding illegal residence as a basis for prosecuting individuals or associations helping undocumented foreigners. Thus, the offence of solidarity was born. There is no such thing as a "solidarity crime" in the French Penal Code on the Entry and Residence of Foreigners and the Right to Asylum. However, this militant expression has flourished; because this made it possible to denounce the Article L. 622-1 of the Code still allowing to prosecute and punish any person who supported, directly or indirectly, including selflessly, an undocumented migrant by transporting, housing or feeding him.

Since then, the law has evolved by introducing exceptions to the rule, without recognising clearly humanitarian acts of solidarity as non-prosecutable, which created a legal grey zone suitable to the harassment of helpers.

#### **b. More Exceptions for More Repression**

The migration law of July 22nd, 1996 introduced family immunity for the first time. The relatives or spouse of the foreigner cannot be suited for aiding illegal residence. However, this immunity is not complete, since relatives can still be prosecuted for aiding illegal entry or movement.

When transposing the European directive of November 28th, 2002; defining the facilitation of unauthorised entry, transit and residence, the French legislators once again refused to include in the law the reference of profit-making, which is included in the directive, and the humanitarian clause which makes it possible not to impose penalties if aid was provided for humanitarian purposes. On the contrary, the Sarkozy Bill of November 26th, 2003, merely increases penalties for these acts once again. On the other hand, immunity is extended beyond the family circle: naturalised or legal individuals cannot be prosecuted when the assistance provided to an alien in an irregular situation is "in the face of present or imminent danger, necessary to safeguard the life or physical integrity" of the alien - provided that there is no disproportion between the means employed and the gravity of the threat and that the assistance has not given rise to any direct or indirect counterpart. This provision, which is supposed to align the concerns of citizens and organisations providing practical help to undocumented migrants; and which were expressed in the first "solidarity offenders' manifesto" launched on May 27th, 2003, supports nevertheless the idea that disinterested aid given to an illegal migrant falls under criminal sanctions.

The Valls Bill of December 31st, 2012, further extends the scope of immunities. Immunity applies when "the alleged act did not give rise to any direct or indirect consideration and consisted in providing legal advice or catering, accommodation or medical services intended to ensure dignified and decent living conditions abroad, or any aid aimed at preserving the dignity or physical integrity of the latter". This law was promulgated after a lively debate about the offence of solidarity both at the assembly and within the civil society. The socialist government promised to erase any trace of it in the legal texts. Instead, it only added other immunities to the list, while increasingly implementing the legal proceedings (see below).

### **c. Recent Developments : Fraternity as a Constitutional Principle**

"The solidarity offense does not exist" explained Gérard Collomb, Minister of the Interior, when he presented the new Immigration and Integration Act to Parliament in February 2018. The proposed law aimed to reduce the processing time of asylum applications, facilitate the deportation of those who were refused protection, but also to improve the protection and reception of people who obtained asylum. It has been strongly criticised by the opposition and part of the majority itself, denouncing a "repressive" text that infringed the rights of those seeking asylum. Furthermore, a group of members from various political factions proposed an amendment to completely abolish the offense of solidarity. The debate has led to the conclusion from the government that there must be "a fair and responsible line" between immunity for those who provide daily assistance and the sanction of "all those who would oppose the will of the state to control borders".

While the proposed law was considered by the Senate before the final vote at the National Assembly, a QPC – civil request on a constitutional issue – about criminalisation of solidarity and principle of fraternity was urgently submitted to the Constitutional Council by Cédric Herrou, an icon of migrant rights defenders and himself convicted for having given a ride to asylum seekers (see below). This request challenged two articles of the Code on the basis of entry and residence of foreigners, modified by the new migration law: the article 622-1, which punishes assistance for illegal residence, and the article 622-4, which specifies that such assistance may not be prosecuted if the family or "any natural or legal person- is responsible - if the alleged act has not given rise to any direct or indirect compensation". The problem is that assistance is defined as "legal advice, catering, accommodation, medical care; which must be aimed at ensuring dignified and decent living conditions abroad". These clarifications are in fact a source of interpretation and have led judges to decide that occasional assistance may be acceptable but not organised, activist or claimed one.

The final decision of the Constitutional Council on the July, 6th, 2018 recognised fraternity as a constitutional principle that may not be violated. The decision recognised for everyone "the freedom to help others, for humanitarian purposes, without concerns on the regularity of their stay on the national territory". With this statement, the proposed law and the code on the entry and residence of foreigners are de facto censored. Therefore, giving assistance for humanitarian purposes to a person in an irregular situation such as help to move or residence should no longer be subject to prosecution. However, assisting illegal entry remains prosecutable. Although refugee aid organisations and activists welcomed this historical decision, they nonetheless stressed that solidarity should not have territorial limits, considering the current difficult situation at the French borders (see below).

The new Migration and Asylum Law was finally adopted on the August 1st, including a new immunity from prosecution for "any natural or legal person whose alleged act has not given rise to any direct or indirect counterpart and has consisted in providing legal, linguistic or social advice or support, or any other assistance provided for exclusively humanitarian purposes". Moreover has the offense of solidarity been erased or restricted once again? Formally, the law still implies that help can be prosecuted. The jurisprudence will tell how the "counterparts" can be interpreted.

Nonetheless, criminalisation of solidarity in France is not only linked to the modification of the Code of entry. It is also the result of a political climate that has been hostile for years to migration; and has consequently created a horrific myth around the means of exile and its facilitators. This resulted in an aggressive State response to protect itself from migration, therefore from criminalising it, by shutting down the borders, and hence, chasing down migrants as well as their support.

## **2. From a Hostile Political Climate to a Violent Migration Policy**

### **a. The Perception of the “Smuggler”**

It is interesting to look at the evolution of the perception in France of the figure of the helper. After the Second World War, the smuggler or “passeur” is legitimised and honoured. The individual incarnates then the heroic figure of the resistance against fascism. Often called “les Justes”, the righteous, they received medals and public recognition for helping Jews to flee the Gestapo and the French police. They provided shelter by hiding them as well as giving them humanitarian assistance, identity papers, or helping them crossing the Alps to reach Switzerland.

However, in the last twenty years, a difference has been made in the public discourse between the figure of the historic selfless hero who saved lives at the peril of its own during the war, and the figure of the greedy smuggler whose business consists in human trafficking, without anything in between. In the early 2000’s the smuggler has become the hidden and ugly face of illegal migration for the Western world. The General Assembly of the UN adopted in 2000 the Convention Against Transnational Organized Crime. This came into effect in September 2003 and was completed by three protocols, among others the Protocol to Fight against the Smuggling of Migrants by Land, Sea and Air in 2004. The texts show that the international community considers illegal migrants are led by human traffickers, organised in mafias and engaged in illegal activities. An illegal migrant is first of all the victim of a smuggler. Fighting against these networks becomes a priority to protect human beings, but it is also a good excuse to fight against illegal migration. The former minister of internal affairs Nicolas Sarkozy presented its law on migration in 2004 by declaring that "one of the most important phenomena in immigration in the last five years is the criminalization of networks". Where are the numbers to legitimise such declarations? They are hard to find, as it has not been yet achieved to statistically demonstrate that all smugglers are part of organized groups taking advantage of abused migrants. Migrants also voluntarily put themselves in the hands of smugglers, although they do not know how the journey will end.

The French penal code defines human beings trafficking in its article 225-4-1 as “the act of recruiting, transporting, transferring, hosting a person in exchange for remuneration or any other benefit or promise of remuneration or benefit, in order to make the person available to him or to a third party, even if not identified, in order to commit against that person the offences of assault or sexual abuse, exploitation of begging, working conditions or accommodation contrary to his dignity, or to compel that person to commit any crime or infraction.” A human trafficker is, thus, legally defined as the one who receives a counterpart for helping a migrant and abuses of its position to force the person into doing something illegal, which may cause physical abuse or lead to exploitation. Nevertheless, this is not the general acceptance of

smuggling in the French public discourse. The difference between a human trafficker and a helper has become thinner and looser. During the summer 2018, as Europe found itself paralysed when Italy repeatedly refused to open its harbours to sea-rescue boats, the French President Macron held a public speech criticising the work of sea-rescue organizations, comparing them with smugglers. This repeated confusion in the political discourse creates an atmosphere of mistrust and defiance within the society towards helpers, who are seen as traffickers and criminals. The consequences are political acts of repression.

#### **b. The State Response to Migration: Closing the Borders and Hostility towards Helpers**

- At the French-Italian Border: Systematic Push-Backs and Violation of Law from the Authorities

The behaviour of the police at the French borders is symptomatic of the political will to criminalise migration and their supports as exemplified by the French border with Italy. Briançon, a small town in the French Alps, has been the theater of tragic events in the first months of 2018. As a result of the radicalisation of police supervision at the border with Italy: in May of 2018, two people were found dead. Blessing Obie Matthew, 21 years old, was found in the river Durance on the May 9th. She had been last seen on May 7th as she was trying to cross the border to France with two other men. Surprised and chased by the police, they tried to run away, but the girl rapidly disappeared, probably fell into the water and drowned. On May 18th, this time, another body of a black male was found in the forest of the village Montgenevre. The local association Tous Migrants accused the police to have failed its obligation to protect, but rather put the lives of migrants in danger by adopting a racist and aggressive behaviour. As for the organisation La Cimade, after various operations of monitoring the border, they stated that at least 22 people had lost their life trying to cross the border in the Alps since 2016.

In the south of France, in the valley La Roya, the border has become another wall of the fortress with an escalation of the police presence since 2015. Systematic controls at the border between Menton and Ventimiglia were reset in June of 2015 and France reactivated a readmission agreement signed with Italy in 1997 to systematically arrest the people trying to cross the border illegally and push them back to Italy. Since then, international laws have been constantly violated by the French authorities. La Cimade mentioned approximately 50 000 informal push-backs have taken place from France to Italy until 2018. The fundamental rights of the migrants have not been respected, and they are not given the opportunity to apply for asylum as they should. Minors are also sent back to Italy, without considering their vulnerability and need for protection, and left to live in terrible conditions in informal camps next to the border. The non-governmental organisation OXFAM, present at the border since 2017, reported repeated cases of child abuse and prostitution to enable them to pay the next trip to France. The Alpes-Maritimes Prefet was condemned twice: for hindering the right to seek asylum in March 2017, and for failing to protect isolated minors at the border in February 2018. Nevertheless, these practices keep going on as witnessed by the local associations such as ANAFE.

- Organized Hostility and Violence Towards Migrants and Activists in Calais

In the North of France, in the region of Calais, dismantling the “jungle” in October 2016 did not solve the problem of wild camps of migrants willing to cross the border to England. The relations between the police, the local authorities, the migrants and the humanitarian associations keep worsening.

The following associations *L'Auberge des Migrants*, *Utopia 56*, *Help Refugees*, *Refugee Info Bus* published a group report on police violence and abuses based on the testimony of volunteers. The report irrevocably denounces the strategies implemented by the police to intimidate and threaten the members of the NGOs, and hence hindering their actions. Testimonies of repeated identity checks, surveillance, being frisked and body searches (especially of women), moral harassment, insults and up to physical injuries from the police relate the tensed situation for volunteers and associative workers. Volunteers are prohibited from taking photos and videos of the police intervening, but are filmed and photographed by the police. The obstacles to the work of civil societies are multiple : from unjustified fines to random confiscation of equipment, unjustified search of vehicles to prohibition of food or basic equipment distributions. The local authorities also proceed to legal action against volunteers and associations for different reasons: defamation, non-compliance with the law and ethics, non-compliance with arrest procedures, identity checks, searches. The police is also reluctant to comply with its duties: refusal to be filmed although according to the circular No. 2008-8433 of December, 23rd, 2008, police officers do not benefit from the right to protection of their image and cannot oppose the recording of their image when they carry out a mission; refusal to transmit their identification number, although mandatory since 2013.

The intimidation and harassment practices also come from the Calais town hall and the Pas de Calais prefecture. Natacha Bouchart, a right wing candidate and close to former President Nicolas Sarkozy was elected mayor of Calais in 2008 and re-elected in 2014. She did not hesitate to encourage the population to denounce illegal migrants on the social media., and by doing so participated in the broadcast of hate speech and in the installation of mistrust between the inhabitants and the migrants. Consequently, this contributed to the deterioration of working conditions for associations and their volunteers. On July, 15th, 2018, Laurent was condemned to a 500 euros fine and had to pay the mayor’s lawyer fees for an amount of 973 euros; because he had put up posters of the mayor’s negligence and condemnation for implementing measures causing inhuman treatments to migrants.

Marine Le Pen, head of the Front National, the extreme right-wing French party, is the deputy of the district at the National Assembly. The FN is very present in the region, as well as several far-right activist groups, such as *Génération identitaire* and *Sauvons Calais*. Their goal: intimidating migrants and members of the charities.

### **c. Accommodation of the State to Far-right Discourse and Banalization of Racist Acts**

In Briançon, the authorities had two very different responses to two related events. On April 21st and 22nd, 2018, the far-right activist group *Génération Identitaire* blocked the French-Italian border in the Alps. Their goal was to show that citizens had to act to preserve themselves from the failures of the State. Their action was widely broadcasted by the national media, and the group was not disturbed by the police, nor was it arrested. On April 22nd, a counter

demonstration started from Clarières in Italy and crossed the border towards Briançon to protest against the militarisation of the borders. European activists and migrants were present. Six people were then arrested to have helped, in organised group, migrants to enter illegally on the French territory. Three of them were immediately released, but three others were maintained in jail until the beginning of their trial on May 31st. The trial has been postponed to November 6th, and the three defendants are now assigned to residence. These two serious events clearly show the difference in treatment between two types of activism.

#### **d. Diversion of Legal Means to Prosecute Helpers**

Since 2014-2015 there has been an increase in law enforcement with effective convictions of activists or citizens in France in solidarity with refugees. Procedures take place mainly in the Roya Valley and the Hauts de France, but also in the large cities of France (Paris, Marseille, Lyon, Bordeaux...). The GISTI, French information and support group for migrants, published a list of condemnations of acts of solidarity that do not refer to the Code on the entry and residence of foreigners since 2009. The legal basis for prosecution were (non-exhaustive): defamation, insult and violence; obstruction to the circulation of an aircraft; violation of the local urban planning code; traffic violation; waste disposal on public roads ... Four out of twenty-five cases were laid-back, five are still waiting for the final judgement, the rest was condemned, with casualties from a simple reminder to the law to a suspended prison sentence and a fine of up to 1000 euros.

The juridical and political environment have become hostile to acts of solidarity, and the situation is not getting any better. Facing the State repression, civil society is trying to mobilize on this issue.

### **3. Criminalisation of Solidarity: Two Symbolic Figures and Mobilisation of Civil Society**

Two cases of criminalisation of solidarity in the La Roya Valley became lately symbols of the criminalisation of solidarity in France, mainly because the individuals concerned are known activists. Still, there are many ongoing cases that are less publicized. The GISTI is keeping an up-to-date list of all the national cases of prosecutions concerning directly or indirectly criminalising solidarity. Meanwhile, the civic society is organising itself to fight against injustice and to promote solidarity.

#### **a. Cédric Herrou, the Roya Valley Shepherd**

Cédric Herrou is now the emblematic figure of the criminalisation of solidarity in France, but he has not always been an activist. He was just a farmer from the South of France, enjoying the exceptional location of its land, in the Roya Valley, stuck between the ends of the French and Italian Alps. One day in 2011 he picked up for the first time a group of Tunisians who needed a lift to the train station. Until 2015, he took many hitchhikers in his car, without asking for their papers. In 2015, when the border closed, he started to receive people in his home, because they could not cross to France anymore and were stuck in the Roya valley. With a group of friends and neighbours, they organised themselves to host the migrants and give them a ride to Nice where they could file an asylum application. This is when he started to act politically. At

first, Cedric Herrou worked in good terms with the police, but after 2015 their relationship deteriorated. At the beginning of 2016, he opened with other activists a squat next to a train station to shelter 50 people, to alert the authorities and the media about the situation in the valley. In the following days, he was arrested for the first time, and since then faced the justice several times for different reasons. In August 2016, he was acquitted for having transported eight Eritreans in his car, the judge recognised the humanitarian nature of the act. However, in February 2017, the sentence was not as magnanimous: he was condemned to a 3000 euros suspension fine, for having brought more than 200 exiles across the border and into his home. The prosecutor accused him of taking advantage of his humanitarian actions for his activism, using the mediatic visibility as a strategy for political purposes, which justified the elimination of the humanitarian immunity. After the appeal, he was finally condemned in August 2017 to four months of prison in suspension, and a 1000 euros fine. Since then, Cédric Herrou became a national symbol of the State repression of humanitarian acts. He continues his activities in the Roya Valley and is also one of the main actors in the fight against criminalisation of solidarity in France. He recently initiated the request to the Constitutional Council.

#### **b. Martine Landry, Prosecuted for Attempting to Enforce the Law**

Martine Landry is a well-known activist from Menton, a small town next to the Italian border. She is an active member of Amnesty International and the association Anafé. As part of her volunteer activities, she used to accompany migrants from the French border to the Nice prefecture, where they could apply for asylum. On July 28th, 2017, two unaccompanied minors were sent walking from the Italian border to France by the Italian border police. Martine Landry received the two fifteen years old at the border and walked with them to the French border police station to submit a request for social support for children. On the 1<sup>st</sup> of August, she was summoned by the Niza tribunal for facilitating the entry of two undocumented minors. Until then, her trial has been postponed four times. In the meantime, she received massive support from the local community and from the national organisations of defense of human rights. She was finally found not guilty on July 13th, 2018, but the prosecutor's office announced it would appeal the decision of the court.

#### **c. The Rise of the Civil Society**

Facing the current events, organisations and activist groups decided to react to mobilise the public opinion on the subject of criminalisation of solidarity. The initiative *Délinquants solidaires*, a network of NGOs and movements fighting against criminalisation of solidarity was created in January of 2017 to act against the increase in intimidation and prosecution of individuals performing acts of solidarity. More than four hundred organisational bodies have signed their manifest. The network shares information through a mailing list on the ongoing events regarding the subject and occasionally organises mobilisations in that matter.

Local initiatives are also flourishing in France, in big cities but also in smaller villages, and particularly in the border areas. Although the Provence Côte d'Azur and the North region are politically right or far-right oriented, some oases of solidarity are to be found. The town of Grande Synthe in the north of France and Briançon are close to the principle of solidarity cities, where organisations and initiatives, work hand in hand with the municipality to organise housing and humanitarian aid for migrants. More recently, in September 2018, some elected



officials of multiple municipalities joined to create an association of welcoming cities and territories. This association is supposed to promote unconditional acceptance at the city level, and to help the created network to share best practices. On the list, officials of Strasbourg, Nantes, Grenoble, Lyon, but also Briançon and Grande Synthe are to be found.

In Calais, the French and British charities created a network of associations working together to provide humanitarian aid to migrants. They also work together to tackle their issues with the authorities and criminalisation of solidarity. Also, the calaisian association l'Auberge des Migrants organised this summer a march of solidarity, which started in Ventimiglia, lasted for two months and ended in London. The goal was simple: to walk across the country and meet the people in the villages and cities to talk about hospitality and solidarity and promote a welcoming France. Although the mobilisation was a success, the marchers came back to a tough reality when seventeen undocumented activists were arrested in the bus heading to London, although the authorities had been told about the action and had not reacted. One of them was transferred to Belgium and was held in a detention centre for various weeks and was finally released.

## **Conclusion**

Every day, individuals act to defend the rights of migrants, or help them to live in dignity. They do so albeit these actions might be considered as civil disobedience. They do so, being aware of the legal risks, as a simple act of humanity. Nowadays in France, the legal framework is such that providing help to an undocumented individual is still considered as illegal, although it has some exceptions. Fraternity has been acknowledged as a constitutional principle but stops where the borders start. The political climate contributes to create a hostile environment for migrants and their helpers, by associating migration with organised international crime. In the meantime, the State is pursuing a brutal policy of border control, where the local authorities and the police repeatedly violate the fundamental rights of migrants and international law, but also harass humanitarian actors and prevent them from helping those in need. Although the situation is worsening, initiatives of civil societies are multiplying, from grass roots activists to municipalities who refuse to let hate speeches win. If the criminalisation of solidarity is a serious issue in France, it is sadly not a national particularity. As the last report of the Transnational Institute showed, criminalisation of solidarity with migrants, from sea rescue to humanitarian aid to open criticism to the racist authorities is widely repressed within the European Union. There is a need of mobilisation at an European level to counter the Fortress Europe: this is why the European Citizens Initiative is trying to collect one million of signatures in several member countries to force the European Commission to act in favor of a more welcoming Europe.