“Liberty, Equality, Fraternity”: the French Constitutional Court confirms the constitutional status and force of the principle of fraternity.

In its Decision n° 2018-717/718 QPC of 06 juillet 2018 - *M. Cédric H. et autre [Délit d'aide à l'entrée, à la circulation ou au séjour irréguliers d'un étranger (Criminal offence of providing assistance to a foreigner entering, moving and residing illegally in France)]*, the Constitutional Court ruled that articles L. 622-1 et L. 622-4 of the Code on the Entry and Residence of Foreign Nationals and on the Right to asylum (CESEDA) as amended by the Act n° 2012-1560 of 31 December 2012 on Detention of Foreign Nationals for the purpose of verifying residence permits and Amending the Offence to Provide Assistance to Illegal Residents with the view to exempting Humanitarian and Disinterested Actions (relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées) were in breach of the constitutional principle of fraternity. These offences are commonly referred to by the media and associations as “délit de solidarité” (solidarity offence; see Serge Slama, ‘*Délit de solidarité : actualité d’un délit d’une autre époque*’ LexBase Hebdo, 20 April 2017) or “délit d’hospitalité” (hospitality offence; see Jacques Derida, ‘*Quand j’ai entendu l’expression "délit d’hospitalité"…*’ (1997) 3 Plein droit, republished in Le Monde of 19 January 2018).

This ruling followed a preliminary ruling on an issue of constitutionality (question prioritaire de constitutionnalité) from the French Court of Cassation on the compliance of articles L. 622-1 et L. 622-4 of CESEDA with the rights and freedoms protected by the French Constitution (Décision de renvoi Cass. - 2018-717/718 QPC).

Under Article L. 622-1,

“Notwithstanding the exemptions provided for in Article L.622-4, anyone who directly or indirectly provides assistance to facilitate the illegal entry, movement or residence of a foreign national in France is liable to five year imprisonment and a 30,000 euro fine.

Notwithstanding the exemptions provided for in Article L.622-4, irrespective of their nationality, anyone who has committed the offence as defined in the first paragraph

of this Article is liable to the same punishment despite being on the territory of a State other than France which is a contracting party to the Convention signed in Schengen on 19 June 1990.

Notwithstanding the exemptions provided for in Article L.622-4, anyone who facilitates or attempts to facilitate the illegal entry, movement or residence of a foreign national into the territory of another State which is party to the Convention signed in Schengen on 19 June 1990, is liable to the same punishment.

Notwithstanding the exemptions provided for in Article L.622-4, anyone who facilitates or attempts to facilitate the illegal entry, movement or residence of a foreign national into the territory of a State which is party to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime signed in Palermo on 12 December 2000, is liable to the same punishment."

As mentioned in this Article, Article L.622-4 provides for a number of exemptions:

"Without prejudice to Articles L.621-2, L.623-1, L.623-2 and L.623-3, assistance to the illegal residence of a foreign national cannot give rise to criminal prosecution on the basis of Articles L.622-1 to L.622-3, when it is provided by:

1. Ascendants or descendants of the foreign national; their spouse, the brothers and sisters of the foreign national or those of their spouse;
2. The spouse of the foreign national, the person who is known to be in a marital relationship with them, or ascendants, descendants, brothers and sisters of their spouse or those of the person who is known to be in a marital relationship with them;
3. Any natural or legal person, when the offending act did not give rise to any direct or indirect compensation and consisted in providing legal advice or providing food, shelter or medical care aimed at ensuring humane and decent living conditions for the foreign national, or any other assistance aimed at preserving their dignity or physical integrity.

The exceptions provided for in 1 and 2 do not apply when the foreign national who receives assistance as an illegal resident is involved in a polygamous relationship or is the spouse of a polygamous person who resides in France with the main spouse."

The plaintiffs contended that the above provisions breached the principle of fraternity on the ground first that the exemption from criminal prosecution provided for in the third subparagraph of Article L. 622-4 applies to cases of assistance to illegal residence only and not to assistance to entry and movement of an illegal immigrant within the French territory; second, that they provide no immunity in the case of assistance to illegal residence even if it is provided for purely humanitarian reasons and without direct or indirect compensation. Further, they contended that those provisions were also incompatible with the principle of necessity and proportionality of offences and punishment; with the principle of legality of offences and punishment since they are not sufficiently precise; and with the principle of equality before the law since only assistance to illegal residence and not to entry and movement within the French territory is exempted from criminal prosecution.

Referring to Article 2 of the French Constitution ('the motto of the Republic is "Liberty, Equality, Fraternity"') and to the Preamble to the Constitution and Article 72-3 which make a reference to the 'common ideal of liberty, equality and fraternity', the Constitutional Court ruled for the first time that fraternity is a constitutional principle from which ensues the freedom to assist others for humanitarian reasons without consideration as to whether the assisted person is legally residing or not within the French territory (paras 7 and 8 of the ruling).

However, the Court recalls that, according to its settled case law, no constitutional principle or rule guarantees that foreign nationals have general absolute rights of entry and residence within the French territory and that the objective of fighting against illegal immigration partakes of the safeguarding of public order.

According to the Court's analysis of the first paragraph of Article L.622-1 jointly read with the first paragraph of Article L.622-4, any assistance provided to facilitate or attempt to facilitate the illegal entry, movement or residence of a foreign national in France is liable to criminal punishment, whatever the nature and the purpose of this assistance. Yet, the Court observes, unlike the assistance given at entry, that which

is aimed at facilitating the free movement of a foreign national, does not necessarily create an illegal situation (para 12). Therefore, the Court concludes that, by criminalising any assistance to the free movement of an illegal immigrant, including when it is the accessory to the assistance to residence and is given for humanitarian reasons, the law maker has failed to reconcile in a balanced manner the principle of fraternity and the objective of protecting public order. As a result, the Court ruled that the words “to the illegal residence”, which are contained in the first paragraph of Article L.622-4, are unconstitutional (para 13).

Furthermore, the Court observed that immunity from criminal prosecution is available only in three situations: where assistance to illegal residence provided without direct or indirect compensation by someone other than a family member of the foreign national consists in providing legal advice; assistance provided in the form of food, shelter or medical care is aimed at ensuring humane and decent living conditions for the foreign national; and where assistance is aimed at preserving their dignity or physical integrity.

However, the Court concludes that the provisions of Article L.622-4 must be interpreted in light of the principle of fraternity as being also applicable to any act of assistance provided on humanitarian grounds (para 14).

Mentioned in the Preamble to the 1848 Constitution, re-established in Article 2 of the 1946 Constitution and solidly anchored in the 1958 Constitution, the principle of fraternity is now given full constitutional value and force.

Many before, such as Guy Canivet (‘La fraternité dans le droit constitutionnel français’, in *Responsabilité, fraternité et développement durable en droit*. En mémoire de l’honorable Charles Doherty Gonthier (2012 LexisNexis) 465-466), Jean-Claude Colliard (‘Liberté, égalité, fraternité’ in *L’État de droit : mélanges en l’honneur de Guy Braibant* (1996 Dalloz)) and Michel Borgetto (*La notion de fraternité en droit public français. Le passé, le présent et l’avenir de la solidarité*, (1993, LGDJ)) have advocated that this principle should be fully recognised in the constitutional case law. For those authors, the principle of fraternity has a dual dimension: a collective one based on solidarity and an individual one based on tolerance.

By ruling that “fraternity is a constitutional principle from which ensues the freedom to assist others for humanitarian reasons without consideration as to whether the assisted person is legally residing or not within the French territory (paras 7 and 8 of the ruling), the Constitutional Court not only stresses the humanitarian dimension of acts of assistance but also provides the freedom to assist a general scope of application irrespective of whether the assisted person has a legal right or not to reside in France.