

The Criminalization of Solidarity in Today's European Union

Christian Dadomo, Noëlle Quénivet and Francesco Tava

Solidarity is often referred to as an essential ingredient of European integration. In the aftermath of the Second World War, Robert Schuman, as well as other founding fathers of the European Union (EU), identified in the establishment of a “*de facto* solidarity” a fundamental step towards the creation of truly unified Europe (Schuman 1950).¹ Since then, scholars and politicians have variously described solidarity as a public virtue and a political desideratum, which can be conducive to higher levels of democratization and global justice (Brunkhorst 2005; Gould 2007; Scholz 2008; Habermas 2013). Solidarity is regularly invoked in the public discourse as a much-needed panacea every time new political and economic crises threaten to endanger life and weaken social cohesion. The numerous calls for mutual solidarity that accompanied the outbreak of the COVID-19 pandemic are simply the latest manifestation of this trend (EGE 2020; Prainsack 2020). Despite the undoubted success and attractiveness of solidarity, especially in times of crisis, recent events have shown the presence within the EU of contrary tendencies, which aim at hindering the expression and practice of solidarity by European citizens with migrants. This chapter uses the reaction of EU member states towards these citizens as an example of an anti-solidaristic trend in Europe.

Scholars and activists often speak of “criminalization of solidarity” to indicate this phenomenon (Fekete 2018; Tazzioli and Walters 2019; Duarte 2020; for a discussion on the concept of irregular migration, see Düvell 2011). The word “criminalization” evokes a legal dimension, which is certainly central to the analysis herein. However, considering the criminalization of solidarity as a mere legal issue would be an error. Because the legal is always the servant of the political, the law being the reverberation of political attitudes and opinions, we contend that the criminalization of solidarity is in all its forms primarily a political problem,

which threatens to undermine the foundations of democratic Europe. Understanding the magnitude and complexity of this problem is a necessary step towards identifying possible solutions.

The expression “crimes of solidarity” frequently recurs in the discourse of activist groups and NGOs, but it is devoid of any juridical validity (Taylor 2018, 4). NGOs and scholarly literature often understand the concept of criminalization of solidarity broadly to cover a vast array of state activities that aim at harassing, penalizing, and suppressing support for migrants. In this chapter, however, criminalization is defined more specifically as the establishment of laws that transform an act into a crime thereby enabling judicial authorities to prosecute individuals for assisting migrants (see also Expert Council on NGO Law 2019, para 5). Such a narrow definition enables us to establish a more granular, legalistic approach towards understanding how the law and its provisions are used to criminalize solidarity towards migrants and who the “real” targets of these laws are. After all, the purpose of the criminalization of an act is to set out permissible standards within society and punish those who disregard these standards (Expert Council on NGO Law 2019, para 28) and who, by doing so, “damage the moral fabric of society as a whole” (Fekete, Webber, and Edmond-Pettit 2017, 7). Criminalization is thus a powerful tool in a state’s arsenal to create a coherent and orderly society. Misusing this tool risks however weakening the very social fabric that it is supposed to reinforce and protect. Moreover, criminalizing solidarity can have broader effects that overcome the boundaries of a single society or state. If we conceive this phenomenon within the frame of a more general attempt to implement a securitization approach in the EU, we see that the criminalization of solidarity indirectly impinges upon the maintenance and transformation of the EU’s internal and external borders (Vergnano 2020, 744). This makes this issue even more in need of careful consideration.

The aim of this chapter is to analyse the criminalization of solidarity in order to offer a deeper insight into this concept within the frame of European migration policies. Such analysis will also enable us to test the conceptual boundaries and potentialities of solidarity in today's Europe. Although there is plenty of literature on the criminalization of solidarity in relation to migration from a sociological and political perspective, very few attempts have been produced so far from a legal perspective. When it comes to discussing the various ways in which solidarity is being criminalized, the law is often mentioned but not analysed in great detail. Legal developments are sometimes detailed in NGO reports or reports for international organizations, but the same emphasis is lacking in scholarly writings. Some legal enquiries address this issue from a human rights perspective by studying the rights of human rights defenders (Costello and Mann 2020), but without focusing specifically on the criminalization issue. In order to fill this gap, we aim at tackling this issue by combining a philosophical inquiry into solidarity – which will allow us to clarify the meaning and function of this idea, and to delimit its conceptual boundaries – and a legal analysis of the criminalization of solidarity – which will focus on the EU internal borders as sites of contestation (an area that is rather understudied compared to the Mediterranean and external borders of the EU). The rather narrow understanding of criminalization of solidarity that we propose here will be coupled with a focus on judicial cases pertaining to individual citizens rather than organizations. This choice is motivated by the fact that whilst organizations such as NGOs are in the “business” of humanitarian assistance and are therefore expected to abide by a certain standard of solidarity, manifestations of solidarity on the part of citizens are usually spontaneous, driven by a sense of civic duty, and shared political ideals. Therefore, one might argue that the criminalization of such spontaneous manifestations can be detrimental insofar as it shrinks civil space and democratic participation either directly (by prosecuting individuals who act in solidarity towards migrants) or indirectly (by using such judicial cases to discourage other people to act

in the same way). To illustrate the point, France is used as a case-study as the solidaristic acts taken by French nationals towards migrants crossing from Italy has led to a great wealth of case-law.

The chapter begins by explaining our conceptual analysis that is built around three fundamental questions: What is solidarity? What is the criminalization of solidarity? What is the type of solidarity that is being criminalized? Identifying the precise target of the ongoing attempts to criminalize solidarity in the EU allows us better to assess the potential outcomes and threats deriving from this tendency, and to identify countermeasures and alternative understandings of the solidarity principle, which are resistant to such forms of criminalization. In the next section, we provide a more granular legal definition of criminalization of solidarity, highlighting how the EU member states' (mis)use of the Facilitation Directive (EU Facilitation Directive 2002) has in fact weaponized national law against a vision of solidarity of a more humanistic nature. We then focus on the judicial practices. In the last section, we argue that although states are the ones that are adopting this anti-solidaristic logic, the opportunity to develop and anchor a more solidaristic approach towards migration might in fact come from the national level and, more specifically, national courts.

EU Solidarity: Conceptual Framework

Before we delve into the problem of the criminalization of solidarity, a conceptual scrutiny is required, in order to clarify the nature and scope of solidarity, understand what triggers its formation and allows its maintenance over time, and clarify what distinguishes solidarity from other pro-social relationships such as charity and cooperation. This analysis will enable us to obtain a more granular understanding of this notion, and to elucidate what kind of solidarity is currently being criminalized in the EU.

Definitions and Origins

The term solidarity usually refers to a social bond characterized by a sense of agreement and togetherness among those who form it.² Unlike charity, which is one-sided and therefore implies detachment and disparity between those who express it and the recipients of its benefits, solidarity is characterized by a substantial equality among its participants, who share a common ground and a feeling of belonging together (Rippe 1998, 357-58) and therefore establish a link based on mutuality and praxis (Isasi-Diaz 1990, 33) rather than on mere benevolence. When it comes to solidarity, there seem to be no passive bystanders – all stakeholders are active members of its process. This reflects the historical origins of this idea, which date back to the French revolution, and its subsequent evolution throughout the nineteenth century (Metz 1999). The creation of horizontal mutual aid structures (e.g., workers' movements and trade unions) – one of the lasting achievements of the post-revolutionary era – allowed citizens to support each other as peers instead of looking for a charitable intervention by the wealthier social classes. According to some interpreters, solidarity is, unlike empathy or friendship, mostly devoid of sentimental connotations. As Arendt (1990) pointed out in one of her rare yet poignant references to this idea, the structure of solidarity, rather than a sentiment, reminds that of a contract. Its participants establish, deliberately and dispassionately, “a community of interest with the oppressed and the exploited” (88). In so doing, they agree to team up for the common good, and to share risks and goals in this process with at least an expectation of reciprocity. This functional nature of solidarity makes it appear as a “cold” bond, especially if we compare it with sentiments such as compassion or pity (89). Though, this cold bond proves to be particularly powerful when it comes to re-imagining a certain state of affairs and triggering social change (Scholz 2008). As Habermas (2013) put it, there is an “offensive character” to solidarity (9). Rather than being passive and defensive, people acting in solidarity tend to develop a high level of proactiveness. They want to achieve something, and they use

this bond to fight in unison in view of this common goal. This also distinguishes solidaristic ties from mere cooperative partnerships, whereby what drives the parties involved to act jointly is the recognition that each of them will benefit from the relationship. Although solidarity (like all contracts) is not incompatible with the attainment of personal benefits (Meacham and Tava 2020: 581), its core is the common goal that all its members want to achieve, despite the risks that this action involves, rather than purely selfish advantages. This focus on shared collective goals and ideals, rather than on the individual gains and needs, is also the reason why solidaristic bonds can easily morph into more stable and durable relationships, whereas collaborative partnerships naturally end as soon as their members either obtain what they want or realize that their membership is no longer advantageous.³

Assuming that Arendt's claim that solidarity is a community of interest with the oppressed and the exploited is correct, the question remains as to how such a community is formed. In other words, what triggers solidarity? Scholars tend to disagree when it comes to determining the sources of this bond. Prainsack and Buyx (2017) emphasize how the recognition of a "similarity in a relevant respect" between the parties involved is required for them to establish a solidaristic relationship (52). In other words, solidarity requires some shared ground that, in specific circumstances, prompts the formation of a solidaristic relationship (see on this also Taylor 2020, 507). This shared ground can assume fewer transient forms whenever people identify it with concrete traits that unite them such as the fact that they all share the same nationality, language, or ethnicity. In this sense, rather than similarity, the terms which are often associated with solidarity in the public discourse are tradition and identity (Scruton 2015). The fact that a group of people identify themselves as French citizens can for instance generate a solidaristic bond, from which other people (e.g., non-French EU citizens or foreign migrants) are excluded. This circumstance seems to confirm the very common idea that solidarity is not a universal value, which therefore deserves to be placed on the same level as

other fundamental moral cornerstones of contemporary democracy such as justice and equality, but is rather exclusive or even adversative (Bayertz 1999, 17; see also Dussel 2007). In other words, being in solidarity with a group of people seems to imply a certain degree of competition or even antagonism with those who do not belong to that group. This phenomenon has recently generated a sort of “competition of solidarities” within the EU where different parties propose conflicting interpretations of this idea – from the transnational, pan-European view of the *White Paper on the Future of Europe*⁴ to the exclusionary and anti-immigrant principle of “flexible solidarity” coined by the V4 Countries (Visegrad Group 2016). Other interpretations tend to shift the focus from the level of similarity between those who are in solidarity to their moral and political agency. Theories of political (Scholz 2008) or project-related (Rippe 1998) solidarity show, for instance, how people who have little or nothing in common can still react in unison to what they consider a manifest injustice, and in so doing they can create a stable bond of collaboration and assistance that one might easily describe as an instance of solidarity. To summarize, we can distinguish two main tendencies in interpreting solidarities.⁵ On the one hand, the various types and degrees of social solidarity are grounded in a sense of similarity, identity, and belonging. People form this kind of solidarity because they recognize themselves in one another. On the other hand, political solidarities are essentially informed by mutual agency aimed at social change. People who share and are committed to jointly achieve certain political goals and ideals form this kind of solidarity despite and not because of their differences. We argue that this latter kind of solidarity is the one that is currently being criminalized in the EU.

Against Solidarity

In the introduction, we described the criminalization of solidarity as the establishment of laws that transform an act into a crime thereby enabling governments to prosecute

individuals for assisting migrants. We now argue that the act of assisting migrants is solidaristic in the second sense we highlighted above, namely in the sense that it creates a community of interest based on shared goals and ideals, which in this case are humanitarian aid and social justice. Both citizens and migrants enter this community, whose aim is not simply to provide immediate assistance, but also to offer a different model of justice that counterbalances the securitization approach of the EU. In other words, by providing (among many other things) shelter, food, medical care and transportation, people do much more than that: they create a renewed social and political space where such actions become the foundation for a better society, of which migrants are active members. They create a stable and lasting community of interest grounded in the principle of solidarity. Following the models and distinctions that we highlighted in the previous section, it emerges that the target of the criminalization of solidarity is not charity or benevolence towards migrants, which are in fact provisions that many political parties identify and promote as examples of legitimate (and undemanding) aid.⁶ The target of criminalization is, rather, that specific kind of political solidarity towards migrants, which aims at promoting social change in the form of models of civic coexistence that go beyond securitization, deterrence, and exclusion. This circumstance is confirmed for instance by the fact that the victims of this criminalization are typically citizens who are publicly exposed (e.g., grassroots activists and public intellectuals – see later). By targeting their solidaristic acts, the state authorities want to avoid the risk that the “community of interest” these people generate with their conduct will expand and attract new members in the civil society. This circumstance makes the criminalization of solidarity an even more worrying phenomenon. Hindering solidaristic practices can in fact weaken a powerful vector of social participation and democratization and therefore cause a shrinking of the European civil space. This risk has been signalled on several occasions. A position paper published by Caritas Europa in 2019 highlighted how “[t]he criminalisation of solidarity goes much beyond the issue of migration:

it threatens our common European values of solidarity and human rights and risks damaging the social trust and social cohesion of our society. This is about the fundamental rights of European citizens to contribute to democracy and the fulfilment of everyone's rights". In a similar tone, the OHCHR reported that "[l]aws and practices preventing civil society organizations from fulfilling their human rights and humanitarian mission and the policing of such organizations erode democratic rule of law principles and societal trust and cohesion" (UN Special Rapporteur on the Human Rights of Migrants 2020, para 81).

The position of the EU, in this sense, is particularly ambivalent. On the one hand, it recognizes that solidarity is a universal value and a guiding principle of its constitution (Charter of Fundamental Rights of the EU, Preamble), urges its concrete implementation, and condemns attempts to restrict its dissemination (European Parliament 2018). On the other hand, some of its laws like the Facilitation Directive are often used by EU member states to reiterate and reinforce the criminalization of solidarity (see later). This ambivalence generates a fundamental tension between "the will of certain European citizens and civil society actors to assist – and by default to *include* – [...] and the perceived will of the EU institutions and its member states to deter – and by default to *exclude* – them" (Allsopp 2017, 20). Given these circumstances, a polarization occurs between European citizens "who still relate to the humanitarian tradition, and the politicians, with their securitised agenda" (Fekete 2018, 75).

Now that the fundamental nature of solidarity and that of its criminalization have been identified, we can explain how such criminalization actually takes place, explore its legal basis, and consider how it manifests itself in the national law and courts of the EU member states.

Criminalization of Solidarity

The criminalization of solidarity is part of a broader socio-political process, but it would be wrong to attribute it to "Fortress Europe", the resurgence of conservatist and nationalist

discourses of exclusion or the 2015 refugee crisis alone. Indubitably, all these phenomena play a role either in buttressing or challenging the criminalization of solidarity. The fact that law is instrumentalized to implement a securitization approach towards migrants and thus support an anti-solidaristic discourse is not novel, but it has rarely been so extensively used by a wide range of EU member states. It is contended that this attitude has been enabled and emboldened by the EU Facilitators Package and the Facilitation Directive, providing member states with a legal basis to criminalize solidarity. In implementing the Directive, several member states have used loopholes and the lack of clarity in the Directive to foster national(ist), exclusive policies targeting those showing solidarity towards migrants.

The Law as Instrument of Securitization and Sanction against Solidaristic Acts

The “criminalisation of solidarity by EU member states is not new” (Fekete 2018, 66); it is part and parcel of migration governance or, more negatively put, the “fight” against irregular/illegal migration. The history of the French *Ordonnance* n°45-2658 of 2 November 1945 illustrates this point all too well (see Carrère and Baudet 2004). It is the product of the 1938 *décret-loi* n°0104 that not only established the minor offence of irregular entry in France as a result of increased Jewish migration (Ben Khalifa 2012, 11) but also provided for a financial penalty and imprisonment for anyone helping or attempting to help directly or indirectly an irregular foreigner to enter, transit or stay in France. Article 21 of the 1945 *Ordonnance* simply reiterated that wording (with some minor amendments) and was later several times amended with a view to increasing penalties for such acts as well as extending its scope of application, notably to implementing the Protocol against the Smuggling of Migrants by Land, Sea and Air (UN Anti-Smuggling Protocol 2000), supplementing the United Nations Convention against Transnational Organized Crime (UNTOC 2000) and the EU Directive and the Framework Decision (Act n°2003-1119 of 26 November 2003). The 1945

Ordonnance was only abrogated in 2005 by the *Ordonnance* n°2004-1248 which created the Code on the Entry and Stay of Foreign Nationals and the Right to Asylum (CESEDA).⁷ This shows, as Barone propounds, that the criminalization of solidarity is not an exceptional but a structural phenomenon that fits into the objectives of migration governance (Barone 2018, 179).

In Europe, the process by which acts of solidarity towards irregular migrants become crimes follows a logic of securitization that is inherent in the migration laws and policies of the EU and its member states; it is a combination of legal, political and social elements and factors on the national, European and international level.

First, law is used to regulate migration. According to a modern understanding of the concept of sovereignty, a fundamental principle of international law, states are endowed with the right to include and exclude individuals from their territories (barring some exceptions) (Vergnano 2020, 753-754). Therefore, ‘immigration control has become conventionally associated with territorial sovereignty’ (Chetail 2017, 922).

Second, this logic of border control and securitization is reinforced by the state fighting organized crime and cracking down on migrant smuggling as the adoption of the Anti-Smuggling Protocol and the 2015 European Agenda on Migration demonstrate (EC European Agenda on Migration 2015, Section III.1). In the ‘War on Smuggling’ (see Albahari 2018), migration becomes a security issue and so laws are drafted to prevent, investigate and prosecute smuggling. Concomitantly, member states, fearing that assistance and support provided to migrants create so-called ‘hotspots’ such as Calais, Ventimiglia, etc. and thus attract more migrants (Webber 2020, 126), limit or withdraw access to support and facilities. As a result, a combination of institutional neglect, denial of basic services by the state, as well as a ‘hostile environment’ (see Expert Council on NGO Law 2019, para 17) and a discourse disincentivizing irregular migration emerge (see EC European Agenda on Migration 2015, Section III.1).

Third, the migrants' dire situation ushers in self-funded, autonomous volunteers and 'activists' to fill the protection gap (Expert Council on NGO Law 2019, paras 18 and 117; Fekete, Webber and Edmond-Pettit 2017, 2; Castelli Gattinara and Zamponi 2020, 628). Citizen initiatives emerge on the local level and build support networks across Europe (Tazzioli and Walters 2019, 177). Moral and political convictions and a common humanitarian sense characterize the behaviour of these volunteers/ facilitators (Vergnano 2020, 752 and 754). They tend to form what we referred to in the previous section as a community of interest, in which solidarity providers and recipients coalesce around the same ideals and principles of behaviour.

New forms of militant engagement, at the intersection of social, humanitarian and political activities, sprang up (Léon 2018, 8) at the beginning of the 2010s (though, in France, this was already evident in the 1990s; Castelli Gattinara and Zamponi 2020, 629). The political and organizational dimension of these initiatives irrefutably leads to the growing political awareness of its members (Vergnano 2020, 751) who deem contemporary policies and laws unfit to address the refugee crisis (Castelli Gattinara and Zamponi 2020, 626). It is more than a transient *cri de coeur*. Contrary to popular opinion, "depoliticized solidarity of 'feel-good activism' remains marginal" (Michailidou and Trenz 2018, 10). Indeed, these refugee solidarity movements, often comprised of individuals who were originally not politically engaged, turn into mass movements that defy the logic of the securitization approach towards migration and offer a different narrative to that of the state (Fekete 2018, 81; Taylor 2020, 497). More specifically, as Allsopp explains, they "contest politics and laws that they believe to be contrary to the 'core principles' of both the EU and its member states, as well as contrary to broader humanitarian or political principles" (Allsopp 2017, 25).

Fourth, as these movements increasingly gain traction, they need to be counteracted. Essentially, solidarity practices, if not already politicized, are viewed as such. Two tactics are deployed by the EU and its member states. Nationalist politicians and far-right groups and

media (UN Special Rapporteur on the Human Rights of Migrants 2020, para 66) and then later the EU and governments of member states pander to nationalistic discourses that regard migrants as threats to social cohesion by drawing on an exclusive solidarity limited to the confines of the nation-states. In combination, they all intimate that NGOs and civil society's efforts to help migrants are a pull factor for irregular migration (Allsopp 2017, 13; Expert Council on NGO Law 2019, paras 20 and 61; Fekete, Webber and Edmond-Pettit 2017, 2; European Parliament PETI 2018, 13), going so far as to claim that NGOs and the civil society collude with human smugglers (Cusumano and Villa 2021, 24; Ben-Arieh and Heins 2021, 206). This toxic narrative of "blame-the-rescuer" (Vergnano 2020, 745) sheds a negative spotlight on those showing solidarity with migrants.

The second tactic is to equate humanitarian assistance to smuggling, even though, as Lambert MEP notes, "smuggling for humanitarian purposes" is not smuggling (Fekete 2018, 72). Humanitarian assistance to migrants is demonized and stigmatized while those defending them are labelled as traitors (Council of Europe Commissioner for Human Rights 2012), guilty of "unpatriotic displays of unacceptable solidarity" (Fekete, Webber and Edmond-Pettit 2017, 2). There are also physical disincentives by way of "push packs, police violence, harassment, deprivation of access to basic services and administrative tools" (Caritas 2019, 1-2), travel restrictions, prolonged detention at the border, targeted financial audits, etc. (UN Special Rapporteur on the Human Rights of Migrants 2020, para 74). These "campaigns of government intimidation" (UN Special Rapporteur on the Human Rights of Migrants 2020, para 74) deter volunteers from helping, creating a chilling effect that discourages solidarity (Caritas 2019, 1). The toxic narrative of representatives of EU institutions and member states further emboldens anti-migrant groups who, as the United Nations Independent Expert on Human Rights and International Solidarity highlights, form a "troubling 'solidarity of sorts'", a "solidarity against humanitarianism" (2019, para 25).⁸

In a last move, this narrative is used to pass or use laws to criminalize solidarity towards migrants with the effect of “censuring acts that embody the principles and values of humanity and civility” (UN Special Rapporteur on the Human Rights of Migrants 2020, para 68). This ultimate step fits within the wider criminalization of migration which is a policy aimed at redefining a social issue into a crime and thereby categorizing an entire group as criminal (Khosravi 2010, 21). Such a policy then enables the state to bring acts and people within the scope of criminal law.⁹ As the UN Special Rapporteur on the Human Rights of Migrants summarizes, “[o]nce the act of migration is tarred as a crime, it is easy to label any group assisting these ‘criminals’ as acting illegally itself” (2020, para 67).

The EU Legal Basis for Criminalization of Solidarity

It is often argued that the legal basis for the criminalization of solidarity is found in the Facilitators Package (see e.g., Aris Escarcena 2021, 5243-5245; Della Torre 2018, 89) or is, at least, a “by-product of the EU ‘Facilitator’s (sic) Package’” (Allsopp 2017, 7). More specifically, the Facilitation Directive has “contributed the most directly and significantly to the maintenance of the legal regimes in most European states that suppress and criminalize humanitarian assistance to irregular migrants” (UN Independent Expert on Human Rights and International Solidarity Report of 2019, paras 21-22). Undoubtedly, a literal interpretation combined with a lack of clarity relating to some notions used in the Directive have enabled states to transpose it in such a way that it criminalizes solidarity.

The Facilitators Package chiefly comprises two legal instruments: the Facilitation Directive and the Council Framework Decision (EU Council Framework Decision 2002), which were adopted to supplement other instruments combatting illegal immigration, illegal employment, trafficking in human beings and the sexual exploitation of children (Facilitation Directive 2002, recital 5; Council Framework Decision, recital 5). They are considered as

“instruments available to prosecutors to address smuggling networks” (EC European Agenda on Migration 2015, 9).

According to its preamble, the purpose of the Directive is to provide a definition of the “facilitation of illegal immigration” and thus to support a more effective implementation of the Framework Decision that imposes an obligation to impose sanctions. Article 1 provides a definition that covers two distinct situations: entry and transit on the one hand, residence on the other.

In relation to residence, Article 1 obliges states to impose sanctions “on any person who, for financial gain, intentionally assists a person who is not a national of a member state to reside within the territory of a member state in breach of the laws of the state concerned on the residence of aliens”. Sanctions must thus be imposed if the person acted for financial gain. “As ‘financial gain’ is an element of the proscribed behaviour, humanitarian behaviour would normally be regarded as outside sanction” (Provera 2015, 13). Confirmation of this interpretation can be found in the UN Anti-Smuggling Protocol which refers in Article 6(1) to “financial or other material benefit” and the fact that the aim of the Protocol is to tackle organized crime groups who benefit from smuggling migrants (UN Office on Drugs and Crimes 2018, 18). The importance of the purpose of the individual’s action is highlighted in the *travaux préparatoires* to the Anti-Smuggling Protocol explaining that it aimed at excluding “activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations” (UN Anti-Smuggling Protocol *Travaux Préparatoires* 2006, 469). In this light, the Directive did not intend to criminalize activities carried out by family members who act out of affection and emotional linkage or individuals who for humanitarian reasons support and assist migrants.

In relation to entry and transit, states are obliged to impose sanctions “on any person who intentionally assists a person who is not a national of a member state to enter, or transit across, the territory of a member state in breach of the laws of the state concerned on the entry or transit of aliens”. This definition fails to refer to the purpose of the person’s act. Whilst the phrase “for financial gain” is used in relation to residence it is conspicuously absent in relation to entry and transit (EU Agency for Fundamental Rights 2014, 9). The Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs of the European Parliament that examined the French initiatives already criticized this omission, noting that “[t]he combating of trafficking in illegal immigrants for purposes of gain must not be confused with humanitarian aid to enable people to flee their country. For this reason, it is important to include the distinguishing criterion of ‘gain’ usually contained in the laws of the member states” (European Parliament Committee on Citizens’ Freedoms and Rights 2000). Providing services to irregular migrants becomes bundled up with human trafficking (the original purpose of the French initiative) and smuggling.

Under Article 1.2 of the Directive, states are allowed to temper this obligation relating to entry and transit by exempting “humanitarian assistance”. As the Commission confirmed, it is “an attempt to remedy the lack of financial or other material benefit requirement” (European Parliament PETI 2018, 30). This approach is riddled with three major problems. First, the voluntary nature of this provision means that there are no binding safeguards. member states are given freedom to implement this exemption. Such lack of obligation has been noted by a wide range of scholars, international organizations and NGOs (see European Commission 2017, 20; Marletta 2020). Second, the concept of “humanitarian assistance” is not defined, again giving too much leeway to states to determine which activities are thereby covered. And thirdly, it creates and maintains a binary vision of support provided to migrants: either an individual/group is making a profit or his/its actions are “humanitarian” (Expert Council on

NGO Law 2019, para 70). This voluntary exemption “risks a debate about what is ‘genuine’ or ‘pure’ humanitarian assistance, as opposed to UN standards of non-criminalization of actions without the intent to obtain financial or other material benefits” (Vosyliūtė and Conte 2019, 7). Based on a field study in Ventimiglia, Vergnano quite aptly shows how genuine acts of solidarity are not necessarily without any financial or material benefit. Some facilitators whose economic situation does not allow them to offer solidarity for free do get paid, but the compensation is minimal in comparison to the financial costs and the risks incurred (Vergnano 2020, 754-755). This is perfectly in line with the conceptualization we offered in section two, where we clarified that solidarity is not purely altruistic (Meacham and Tava 2020, 581) but is rather a contractual bond between equals – individuals or groups who, on the basis of shared goals and ideals, and despite the risks involved, decide to form a shared community of interest.

The 2002 Directive is riddled with flaws and, assuredly, member states in their transposition of the Directive have used the leeway to pursue their own national(ist) interests and approaches to migration governance.

The Transposition of the Facilitators Package into National Law

According to Article 4(3) (principle of sincere cooperation) of the Treaty on the Functioning of the European Union (TFEU) and Article 288 TFEU, member states are obliged to transpose a directive into their national legal order. However, Article 288 TFEU indicates that the “directive shall be binding, as to the result to be achieved” and “shall leave to the national authorities the choice of form and methods.” Given the poor phrasing, the omissions and the lack of definitions in the Facilitation Directive, it has been implemented in various ways in member states and misused against civil society organizations (UN Special Rapporteur on the Human Rights of Migrants 2020, para 70). Some states have also legislated in contravention to the Directive.

For example, despite the clear wording of the Directive, 13 member states had as of 2018 not included the reference to financial gain in relation to assistance for residence into their national legislation (European Parliament PETI 2018, 11). This is the case for France (former Article L.622-1 of CESEDA; new Article L.823-1, L.823-2 of CESEDA). The difference in the phrasing relating to residence on the one hand and entry and transit on the other was expressly noted in the parliamentary report concerning the transposition of the directive. However, this lack of distinction was not adopted in French law. After all, so the report explains, the government did not want any exception that might limit the scope of the legal provision or reduce its efficiency. It recalled that already in 1994 (Act n°94-1136 of 27 December 1994), the legislator had been opposed to add the condition of “financial gain” as other types of motivations such as spying, terrorism, or Islamic networks should be caught (Mariani 2003, 85). Yet, if one goes by the adage “what is not prohibited is allowed”, then France complies with the letter of the Directive. The problem is that the lack of express reference to financial gain or benefit carries with it the danger that individuals will be prosecuted for helping relatives or acting out of humanitarian motives (UN Office on Drugs and Crimes 2018, 18). Interestingly, the idea of financial gain was contained in Article L.622-4 CESEDA 2005 and still is under Article L.823-9 CESEDA 2021 which condition the humanitarian exemption to acts for which no direct or indirect compensatory benefit is received. This is however not where the concept of “financial gain” should apply. It should be in the definition of smuggling and not in the exceptions. Even when “financial gain” is explicitly mentioned in the law, it might be interpreted in various manners in the member states’ jurisdictions as it is “left mostly to the discretion of the judicial authority or even ignored in the national law” (European Commission 2017, 23).

A second problem relates to the lack of the use of the humanitarian exemption. At the time of the implementation of the Directive the French government expressed the opinion that

there should not be any exceptions. In other states, the voluntary nature of the humanitarian exemption led states to criminalize the work of human rights defenders (European Parliament PETI 2018, 13-14). Gradually, though, states introduced an express humanitarian exemption: seven by 2018 (European Parliament PETI 2018, 11), eight by 2020 (EC Guidance 2020, 5) and the Commission has in its 2020 Guidance encouraged states to do so (8). In some cases, the clause averts trials from being opened, in others it only allows for the sanction not to be applied (Della Torre 2018, 93). An additional problem is that in some states the humanitarian exemption applies to facilitation in cases of residence and not to entry as specified by the Directive (Marletta 2020). For example, Article L.622-4 CESEDA in 2013 only covers “assistance to the irregular stay of an alien”, as national courts have confirmed (Court of Nice Peirotti 2017, 6; Court of Aix Peirotti 2018, 8). A broad interpretation of the humanitarian exemption might also catch the legislation of some states referring either expressly or impliedly to “necessity” such as France (Article L.622-4 CESEDA in 2005 though applying to residence rather than entry). However, it should be stressed that such a clause can only be invoked in cases where the migrant’s life or physical integrity is at stake – which is not what “humanitarian assistance” is – and raises the question as to what is deemed “necessary” and “proportionate” (Geisser 2009, 10). An even broader and mistaken interpretation might include the state of necessity that is found in general domestic criminal law. It might therefore be contended that this is not in line with the “humanitarian assistance” notion used in the Directive.

What is in line with that concept is nevertheless unclear because the nature and scope of the concept of humanitarian assistance is not elucidated in the Directive. As the Commission expounds, “there is no ‘one-size-fits-all’ European definition of what constitutes humanitarian assistance in each and every situation. Member states generally do not define the concept of humanitarian assistance in their legislation but leave it to the appreciation of the competent national authorities” (European Parliament PETI 2019). Each state is free to define what

humanitarian assistance encompasses; some states have adopted vague definitions or narrow interpretations (Ben-Arieh and Heins 2021, 205) by limiting it to assistance to migrants in distress at sea, as is the case of Greece (European Parliament PETI 2018, 37). With time, some states such as France have improved their legislation. By Act n°2012-1560 of 31 December 2012 France amended Article L.622-4 CESEDA to the effect that, despite the lack of express mention of an exemption of “humanitarian assistance”, it covered providing legal advice, food, shelter and medical assistance to ensure humane and decent living conditions to the foreign national or any other assistance aimed at preserving his/her dignity and physical integrity. Later, by Act n°2018-779 of 10 September 2018, the word “humanitarian” appeared in the text which exempted acts that consisted of providing legal, linguistic or social advice or support or any other aid provided for an exclusively humanitarian purpose, a wording that was transferred into the new Article L.823-9 CESEDA that entered into force on 21 May 2021. Yet, the humanitarian exemption is only available in relation to the stay and movement (“*circulation*” in French) and not the entry or transit of foreign nationals. Moreover, the two versions were flanked by the requirement that the act was carried out without direct or indirect compensation and the latter specified that the aid was to be *exclusively* humanitarian, thereby reproducing this empirically ungrounded binary approach towards solidarity (Kolankiewicz and Sager 2021, 592).

The way the law is phrased at the national level works as a strong deterrent to any demonstration of solidarity towards migrants. The law in the books is a clear warning against solidarity.

State Practices of Criminalization of Solidarity

The criminalization of solidarity has not only taken place on paper, i.e., in the legislation in the member states, but also in practice. Indeed, courts are “part of the border

regime in times of a humanitarian crisis” (Kolankiewicz and Sager 2021, 591). Reports by think tanks, NGOs, international organizations (including the EU) are replete with examples of actual judicial practices of criminalization of solidarity. Yet, the lack of a systematic survey means that it is difficult to establish a pattern or show how widespread the practice is in the EU member states (see e.g., European Parliament PETI 2019, 2). To avoid a potential allegation of being anecdotal, this chapter uses a combination of judicial cases adjudicated in France relating to solidarity shown to migrants in the “hot spot” of Ventimiglia,¹⁰ stakeholder reports, and academic literature to illustrate the practice and draw conclusions from such practices. This contribution thus focuses on the prosecution of “ordinary citizens” for providing support to migrants at the internal borders of the EU, i.e., on entry and transit (articles 1(1)(a) and (2) of the Directive).

Practices

Prosecutions seem to be clustered around hotspots or flare-up points on borders such as Ventimiglia in Italy, Calais in France, the Oresund bridge from Copenhagen Denmark to Malmo Sweden, Lesbos in Greece (Fekete, Webber and Edmond-Pettit 2017, 4) or the Austrian/German and the Austrian/Hungarian border (Webber 2020, 125). In France, the overwhelming majority of the cases on assistance to entry relate to passages in the Alps and notably the Roya valley (Court of Nice Peirotti 2017; Court of Nice X and Y 2018; Court of Nice Faye-Prio 2017; Court of Nice Herrou 2017).

The acts that have been prosecuted are providing a lift in a vehicle (Court of Nice X and Y 2018), otherwise aiding to cross a border (Court of Nice Peirotti 2017; Court of Nice Faye-Prio 2017; Court of Nice Herrou 2017), lending mobile phones and facilitating Western Union payments to migrants planning to cross a border (Expert Council on NGO Law 2019, para 85).

Those targeted by investigations, threats of arrests, arrests and prosecutions are often ordinary citizens (Webber 2020, 137; Court of Nice X and Y 2018; Court of Nice Herrou 2018). In fact, “[l]aws used to criminalise the work of civil society organizations that work with migrants have also been leveraged against people working in an individual capacity” (UN Special Rapporteur on the Human Rights of Migrants 2020, para 71). Yet, these are often individuals who are volunteers of solidarity movements (Expert Council on NGO Law 2019, para 91). In France the movements “*Habitat citoyenneté de Nice*” (Court of Aix Peirotti 2018, 3) and “*Roya Solidaire*” (Court of Nice Herrou 2017) were targeted.

Changes in the law have not necessarily led to changes to the practice (Della Torre 2018, 95). “The fact that even in cases where the humanitarian clause has been transposed, this Directive has been used as basis to prosecute civil society actors and organisations, illustrates the situationally and discretion with which it has been instrumentalised by EU member states” (Aris Escarcena 2021, 5244). Formal prosecutions occurred in Belgium, Greece, Italy, and Malta where humanitarian exemptions were declared (European Parliament PETI 2018, 11; Janer Torrens 2020, 395). In France, despite the so-called humanitarian clause included by the 2012 Act, prosecutions against ordinary citizens were still mounted.

The reason for this is that courts tend to adopt a narrow interpretation of the concept of humanitarian assistance. As Vosyliūtė and Conte explain, exemptions are often limited to situations of life and death (similar to the concept of necessity) and “exclude broader notions of upholding the fundamental rights of refugees and other migrants” (Vosyliūtė and Conte 2019, 7). As the Commission expounded in its 2020 Guidance, the power to define the concept is indeed left in the hands of the judicial authorities which “have to strike the right balance between different interests and values at play” (EC Guidance 2020, 6).

For example, in the well-known case of Herrou, a French farmer helped migrants cross the French-Italian border and created an association to bring together those who wanted to help

migrants. The Court deemed his militancy/activism (“*militantisme*”) as falling outside the scope of the humanitarian clause (Court of Aix Herrou 2017, 8). In the cases Peirotti and Faye-Prio, the same court referred to their militancy to state that they knew the migrants were in an irregular situation (Court of Aix Peirotti 2018, 8; Court of Aix Faye-Prio 2019, 6). In the eyes of the Court, the lack of spontaneity in action and the affiliation to an association known to support migrants in an irregular situation precluded the application of the humanitarian exception as in French law it was conditioned by the adverb “exclusively”. The Court of Cassation, however, rejected this approach, asserting that acts that are deemed exclusively humanitarian are not limited to acts that are purely individual and personal and do not exclude actions that are not spontaneous and of a militant nature when exercised as a member of an association (Court of Cassation Faye-Prio 2020, para 15). This seems to have now settled the debate on whether acts of militancy fall within the purview of the humanitarian exemption.

Another issue concerning the definition of “humanitarian assistance” related to the use of examples of such acts rather than an express reference to it. For example, Article L.622-4 para 3 of the 2013 CESEDA listed the provision of legal advice, food, shelter and medical care but did not use the adjective “humanitarian”. The list was extended to other types of humanitarian acts as the Constitutional Court stated that the humanitarian exemption covered more than the enumerated acts and applied to any other acts of assistance carried out for a humanitarian purpose (Constitutional Court Herrou 2018, 14).

Whilst it is to some extent pleasing to see that some of these issues have been addressed by the French courts – though not necessarily in a fully satisfactory manner –, similar problems remain unaddressed in other EU member states.

Consequences

The overwhelming majority of the cases do not lead to convictions (Caritas 2019, 6; UN Special Rapporteur on the Human Rights of Migrants 2020, para 73) which confirms that it is the government that is promoting the criminalization of acts of solidarity. As Fekete highlights, the “intention seems to be not so much to prosecute more people but to warn those in civil society and public office that the threat of prosecution is real and imminent” (Fekete 2009, 84). Such prosecutions have a deep impact not only on the individuals involved but also on those considering helping migrants. More fundamentally, it reveals the state’s real target, the spontaneous formation of citizens’ initiatives that profoundly challenge migration governance in the name of dignity and decency. In other words, what is being criminalized is not solidarity or solidaristic acts *per se*, but the fact that such acts are performed within a political sphere where forms of resistance and antagonism can emerge from the part of those who reject the paradigm of securitization. By discouraging the formation of political solidarity around the humanitarian principle that migrants deserve aid and protection, the State authorities’ objective is to hinder the spreading of solidaristic acts and thereby the emergence of a strong community of interest as this would jeopardize their political agendas.

Being prosecuted and in fact branded as a criminal, if even only “alleged”, has a profound and long-lasting psychological effect on individuals (Caritas 2019, 6) who are often traumatized for having been detained and vilified by the press, the authorities and the general population (Geisser 2009, 15). Their reputation has been tarnished. In some instances, they are also put under surveillance by the police, their details entered into a register and their houses searched (Geisser 2009, 14; Allsopp *et al.* 2021, 81). In addition, there is a financial cost as these individuals face fees for legal advice and counsel (UN Special Rapporteur on the Human Rights of Migrants 2020, para 73). Moreover, these “proceedings cause a significant burden to be born (sic) both by the prosecuted individuals and by the civil society movements that work with them and/or support them before and during the process” (Aris Escarcena 2021, 5245). It

is true that in many instances, solidarity groups have formed around those prosecuted. For example, in France, support has stemmed not only from well-known international (e.g., Amnesty International France) or national (e.g., *l'Anafé* and *La Cimade*) NGOs but also from groups created for the very purpose of supporting individuals (e.g., the *Comité de Soutien au 3+4 de Briançon*; *Délinquants Solidaires*).

These prosecutions have often been pre-marked by some form of spectacle as it helps build a “criminal” image of the individual. Aris Escarcena explains how Herrou’s arrest and prosecution was to “show the criminality of [his] actions, intimidate other citizens and break social dynamics of self-organization in defence of the fundamental rights of migrants” (Aris Escarcena 2021, 5247).

Besides, this constant flow of arrests and prosecutions is part of a “politics of exhaustion” (Aris Escarcena 2021) as some individuals – Herrou (see Taylor 2020, 496), Peirotti (Court of Aix Peirotti 2018, 3) – or members of the same association – “*Roya citoyenne*” (Court of Nice Faye-Prio 2017, 3) – have been repeatedly arrested and/or tried. This physical, social and symbolic “wear and tear” (Aris Escarcena 2021, 5245) is meant to discourage any form of solidarity towards migrants.

There is no need to go to trial as being warned, being arrested and taken into custody is enough to create a climate of fear that discourages solidarity and fraternity (Observatoire pour la protection des défenseurs des droits de l’Homme 2009, 21). Legal proceedings are undeniably a deterrent, a warning to people who might want to act in solidarity with migrants (Caritas 2019, 6; UN Special Rapporteur on the Human Rights of Migrants 2020, paras 72-73; European Parliament PETI 2018, 16; Geisser 2009, 14). The chilling effect is undisputed: individuals err on the side of caution (Allsopp 2017, 12) to the effect that regardless of judicial outcomes, prosecution “has served to discourage solidarity” (Expert Council on NGO Law

2019, para 119) and the fear of sanction has contributed to “collective indifference” (Allsopp 2017, 9).

(Un)remarkably, individuals targeted by prosecution are those challenging the EU and the member states’ migration policies not only by their own personal action but also by fostering and sometimes championing a citizen movement (Court of Nice Herrou 2017). The real targets are “self-consciously defiant actions and the formation of solidarity groups” (Webber 2020, 137). As Tazzioli and Walters stress “the ongoing criminalisation of solidarity practices in Europe concerns less the acts and gestures per se than the autonomous channels and logistics of support – independent from state-led humanitarianism – that these small groups, spontaneous networks [...], and individual citizens put into place.” (Tazzioli and Walters 2019, 186). Rather tellingly, the more severe punishments go to those who are politically engaged (Fekete 2018, 79) and have encouraged others to take part in these actions (see the Zornig case in Denmark).

More fundamentally, these individuals show spontaneity in an area, that of migration, that the state wishes to keep highly and strictly regulated and controlled. As explained above, the concept of state sovereignty allows states, barring some exceptions, to dictate who enters, transits through, and stays on its territory. Some “states perceive civil society and support operations as a type of threat to national security, given the impact these groups are said to be having on states’ sovereign ability to control their borders” (Expert Council on NGO Law 2019, para 21). If migrants are to be let in and taken care of, then it must be under the state’s governance or control. Co-opted NGOs and (formal) humanitarian associations (see Aris Escarcena 2021, 5253) are welcome to assist, provided they comply with the order as instituted by the state. The state accepts/tolerates their presence and assistance because they are regarded as endowed with the relevant knowledge and experience, staffed by professionals, possessing advanced structures of coordination and hierarchically organized (Leon 2018, 10; Expert

Council on NGO Law 2019, para 19). In contrast, spontaneous acts of solidarity are not permitted, notably because such individuals and groups are less inclined to follow government policies (Expert Council on NGO Law 2019, para 21) and thus cannot be manipulated by the state (Tazzioli and Walters 2019, 185). What is under attack is the mobile and precarious infrastructures deployed to support migrants (Tazzioli and Walters 2019, 185; see also Court of Nice Herrou 2017). Resultantly, the criminalization of solidarity has nurtured a rift between co-opted NGOs on the one hand and citizen initiatives and grassroots movements whose members are more loosely connected on the other, the latter being targeted for prosecution (Tazzioli and Walters 2019, 181-182). Remarkably, as the interviews carried out by Castelli Gattinara and Zamponi with grassroots activists in France reveal, they do not like to be considered as “humanitarian”, favouring references to their political identity (Castelli Gattinara and Zamponi 2020, 633). By prosecuting these individuals and movements, the state is signifying its disapproval of unwarranted assistance to migrants and so disturbing the creation of associations and networks thereof (Aris Escarcena 2021, 5249; see also Court of Nice Herrou 2017, 15). The eruption of practices and spaces of solidarity is highly problematic for the state, contesting “the rise of a neo-Westphalian world order, the reaffirmation of the discretionary control of states over their national borders, and the criminalization of migration itself” (Ben-Arieh and Heins 2021, 207).

They are even more so as these practices are horizontal alliances between people (see Tazzioli and Walters 2019, 183-186); they are social relations between individuals, villagers, associations, etc. that lead to “local practices and temporary transversal alliances between migrants and citizens” (Tazzioli and Walters 2019, 187). This is the key distinguishing factor between them and NGO volunteers and workers. As Rozakou highlights in relation to her fieldwork in Greece, NGO volunteers/workers tend to see migrants as people in need whereas activists consider them as human beings with whom one can socialize (Rozakou 2016, 189).

Whilst the former group espouses a professional rhetoric and refer to their work as a service to beneficiaries, activists “abide by the principles of egalitarian and empowering relatedness” (Rozakou 2016, 194). As states disapprove of these horizontal relationships, they use the law to “disrupt the dynamics of social interaction between migrants and civil society; a strategy to block the dynamics of autonomy of migration and acts of citizenship” (Aris Escarcena 2020, 5242).

By the same token, these individuals structurally question the securitization of migration, an approach in which national(ist) policies and fear play a significant role in regarding migrants as a threat to security. Unlike NGOs that are deemed part of the migration governance system (Tazzioli and Walters 2019, 181-182) and supporting the state’s unwillingness to act (Leon 2018, 10), they try to undo the hostile environment, de-securitize spaces (Tazzioli and Walters 2019, 185) and threaten the symbolic foundations of the border regime. In short, solidarity, as expressed by these individuals and movements, challenges the state’s approach towards migration. Prosecution is a way to deter the emergence of a practice of solidarity towards migrants, a positive sentiment towards migrants and thus, potentially, a change in the legal approach towards migration.

Solidaristic practices towards migrants thereby foster civil disobedience which “occurs when citizens break the law in public, non-violent, morally justified, and communicative ways to press for local changes in the political and legal order of a community, while recognizing the general legitimacy of that order” (Celikates 2019, 70). Vergnago’s field research in Ventimiglia highlights that all facilitators use “a narrative that engages in the subversion of state power” (Vergnago 2020, 754; see also Tazzioli 2018, 9). In other words, individuals do not see the law relating to irregular migrants as legitimate, moral (see Taylor 2020, 508). It is even argued that they feel obligated to contest the law (Taylor 2020, 509); they are consequently ready to break the law themselves and encourage others to act in a similar manner.

In fact, their collective actions offer alternative interpretations of the problem at stake (Castelli Gattinara and Zamponi 2020, 627). The comments made by the defendant in front of and before the tribunal and the support groups attending the trials that lead to heightened media attention are testimonies of these groups calling for change. The courtroom becomes the site for social interaction and mobilization giving people a voice and making them visible (Haddeland and Franko 2021, 3). As Kolankiewicz and Sager highlight, “the trial becomes a manifestation of the state’s power over its borders, through criminalization of some forms of mobility and some practices of solidarity with migrants” (Kolankiewicz and Sager 2021, 591). The state then tries to reclaim its sovereignty and strengthen its authority with the aim of restoring public order (see e.g., Court of Aix Peirotti 2018, 9).

Towards an Alternative Vision of Solidarity towards Migrants

That common citizens, individually or collectively, defy the state, nurturing some form of civil disobedience shows that the EU and its member states have got the law wrong. As Schmalz pertinently observes, when acts of humanity are seen as crimes, the law has a problem (Schmalz 2019). These actors challenge the legitimacy of crimmigration “by uncovering discrepancies between penal power and core values such as human dignity and compassion” (Haddeland and Franko 2021, 3). The law must therefore comply with these core societal values in order to be deemed valid in the eyes of the citizens. In particular, the legitimacy of criminal law very much lies in the ability of the state to show that it reflects societal normative expectations (Haddeland and Franko 2021, 4) and the growing use of criminal law for political purposes “undermines public faith in liberal democracy” (Allsopp *et al.* 2021, 81). As Ben-Arieh and Heins stress, “[d]isagreements [...] cannot be resolved simply by appealing to the text of the law, which is always open to interpretation and does not automatically instil a feeling of obligation on the part of the public” (Ben-Arieh and Heins 2021, 202).

It is argued that, against the odds, the approach that has worked best so far in terms of effecting changes through law is the national one as it is thanks to citizens, by “breaking the law and taking action to protect human rights, that the law in turn is transformed” (Costello and Mann 2020, 333). Using constitutional (i.e., national) principles, the French Constitutional Court has offered an alternative vision grounded in law. The case of *Herrou* is cited as an example of how “some courts and constitutional councils have begun to push back against this wave of criminalization” (Special Rapporteur on the Human Rights of Migrants 2020, para 73) and as an indication of “the growing realization even within Governments of the anti-human rights nature of such edicts” (UN Independent Expert 2019, para 48).

The case was a reference from the French Court of Cassation that had been asked to engage with the principle of solidarity. It stemmed from individuals who were attempting “to revive and recover a vanishing dimension of French values, namely solidarity and fraternity” (Taylor 2018, 50). After all, France has a history of “claiming itself as the land of hospitality and asylum (as *La France hospitalière* and *France terre d’asile*) as well as the patrie (home) of human rights” (Taylor 2020, 505). The French Constitutional Court held that based on the principle of fraternity there could be no crime of humanitarianism for helping people on the French territory. “‘Facilitating’ irregular stay has been constitutionally reinforced” (UN Special Rapporteur on the Human Rights of Migrants 2021, para 88). However, a correlation was made between movement and residence, the former being the accessory of the latter (Constitutional Court *Herrou* 2018, para 13). As a direct consequence of this judgment, the humanitarian clause in Article L.622-4 CESEDA following the 2012 Law that was limited to assistance provided in relation to the stay of migrants was extended to “movement” (“*circulation*” in French) in 2018.

Yet, whilst the Constitutional Court referred to movement and stay it did not extend its jurisprudence to humanitarian facilitation of entry. It did not take the opportunity to declare the

provision of humanitarian assistance irrespective of entry, transit or residence as unconstitutional but rather restated that it was unlawful to provide such assistance in relation to entry (Constitutional Court Herrou 2018, para 12). Subsequently, a court rejected the defence's submission that the Constitutional Court ruling was applicable to cases of entry too (Court of Gap The 7 of Briançon 2018, 10). Facilitation of border crossings remains unlawful after the Constitutional Court's decision and so humanitarian assistance in relation to entry remains criminalized regardless of its purpose. This means that the concept of fraternity cannot be transboundary and so the Court seems to have legitimized an exclusionary border regime (Aris Escarcena 2021, 5248), thereby accentuating the physical and moral significance of the border. The principle of fraternity has thus found its moral and geographical limit.

The direct consequences of this judgment are threefold. First, the law was changed. Originally a "*nota*", explaining the judgment of the Constitutional Court, was added onto the text of Article L. 622-4 of the 2012 version of CESEDA and then an Act was passed in 2018 to amend the legal provision. This clearly shows that a decision of a court can effectuate changes. Nonetheless, it should be borne in mind that such power only lies with specific courts, such as constitutional courts, that can declare certain legal provisions unlawful/unconstitutional. Second, even higher courts that do not have the power to make such declarations of incompatibility/unconstitutionality can, by adopting a friendly approach towards humanitarian assistance to migrants, be vectors of changes inasmuch as their decisions have value of precedence and are to be followed by lower courts. The downside is unfortunately that some higher courts might take anti-solidaristic decisions. Thus, the key point is that the highest courts send the "correct" signal. Third, the significance of the judgment is also felt more deeply in that the debate around the case has led, at national level, to the creation of an environment that is more (though not entirely) conducive to solidarity towards migrants and somehow hampered an acerbic discourse that muddles smugglers and concerned citizens.

Although the concept of fraternity finds its basis in the French constitution and is unmistakably idiosyncratic to French law, it is not totally devoid of significance for other jurisdictions. As Okafor, the UN Independent Expert on International Solidarity argues, “the example that France has set in the celebrated *Cedric Herrou* case is worthy of widespread emulation and replication” (Okafor 2020, 112) though perhaps not necessarily in that form.

First, the solidarity concept is to some extent derived from the principle of fraternity. Fraternity, as Rakopoulos contends, “was the original conception of political modernity [...] before ‘solidarity’ took its place” (Rakopoulos 2016, 146). It moved beyond the face-to-face and immediate allegiance with fellow humans. Moreover, fraternity is not a concept solely related to citizens, those who belong to the same polity; the fraternity net is cast much wider.¹¹ As Taylor explains, the French Republican idea of fraternity is a version of universalism (Taylor 2018, 45-47). This means that solidarity could be conceived as, and elevated to, the rank of a constitutional principle in other jurisdictions too.

Second, solidarity is intrinsically linked to human dignity. The eminence of human dignity and solidarity as fundamental, universal values is emphasized in Article 1 Universal Declaration of Human Rights which affirms that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (UN General Assembly 1948, Article 1). The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms also stresses everyone’s right “to promote and to strive for the protection and realization of human rights [...]” (UN General Assembly 1998, Article 1). It might thus be argued that human dignity can be achieved through the solidarity medium and so the principle of solidarity ought to be read into the principle of human dignity. Such an interpretation could be used in Germany, for example, as the Basic Law is based on the fundamental principle of human dignity anchored

in Article 1 and so national law is to be interpreted in light of the principle of human dignity. Courts of other EU member states whose constitution refer to the principle of human dignity (e.g., the Estonian, Lithuanian, and Slovakian constitutions) could also espouse such an approach, thereby ensuring that solidarity towards migrants is not criminalized and punished as such.

Conclusion

The criminalization of solidarity is not new. Citizen movements and initiatives have not yet managed to change the law or at least the way it is applied so that it conforms to their expectations as to how it should operate. This strategic civil disobedience is however a powerful catalyst for political debate, the best proof being the impressive number of (research) papers written by NGOs, think tanks, associations and even bodies of international organizations. The EU and the member states are nevertheless deaf to this call by citizen movements and blind to the reams of papers written by reputed organizations. By tracing the conceptual and legal outlines of this complex phenomenon, we have in this chapter paved the ground to what we contend is an alternative vision of solidarity towards migrants. Such vision is grounded in the possibility of reviving a vital source of solidarity in the national (and, in particular, constitutional) legislation of the EU member states. This position has three main advantages. First, dealing with national solidarities, instead of with a more generic notion of pan European transnational solidarity, allows us to identify a more solid, democratic, and context-based foundation for this notion. Particularly, the reference to principles that are pivotal in national constitutions (such as fraternity in France), help reinforce the popular legitimacy of solidarity and thus overcome the limits of top-down versions of European solidarity like those proposed by EU institutions, which are often perceived as abstract and not fully functional. In the words of Apostolos Tzitzikostas, President of the European Committee

of the Regions, in his response to the state of the EU speech delivered by the President of the European Commission in September 2021, “we will not deliver these shared goals [among which is “the strengthening of the European Union’s solidarity”] by taking a top-down approach. The EU must respond to the real needs of people in the places where they live and work. Only by applying a bottom-up approach Europe can succeed and re-build citizens’ support in their hearts and minds” (Tzitzikostas 2021).

Second, referring to nation-based, democratically and legally enforced solidarities makes it possible to dispel the false assumption that national solidarities are equal to nationalistic variants of this notion. We argue that it is possible to identify and reinforce the national and constitutional roots of European solidarities without lapsing into nationalistic rhetoric whereby defending (e.g.) French solidarity would imply enacting unethical actions against foreign migrants in need of assistance or (as we have seen in the case of the criminalization of solidarity) against those citizens and organizations who aim at offering such assistance. In this chapter, for length reasons, we have limited our scope to France and its principle of *fraternité*, but we have also highlighted how similar solidaristic narratives can be identified in other constitutional apparatuses along the lines (for instance) of the idea of human dignity. Building interconnected narratives of national European solidarities can be a good way to counter dangerous misappropriations of this principle and shed new light on the local, grassroots manifestations of solidarity practices.

This leads us to the third and last point. Focusing our analysis on the national level does not mean that we reject a more holistic view. We argue that it is possible (and even necessary) to think about and contribute to implement European solidarity beyond national borders. As the above showed, however, we also think that the foundation of European solidarity requires the interplay of separate and complementary solidaristic narratives stemming from different national legal contexts. This approach provides a more solid ground to a European solidarity

understood as a dynamic and permeable community of interests, beyond and against the securitization paradigm.

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¹ See on this topic Castaldi's contribution (Chapter 10) to this volume.

² On the notion of solidarity, see in particular Bayertz 1999; Brunkhorst 2005; Kolers 2016; Scholz 2008.

³ On the distinction between solidarity, charity, and cooperation, see Prainsack's (Chapter 15) contribution to this volume.

⁴ "We want a society in which peace, freedom, tolerance, and solidarity are placed above all else" (European Commission 2017, 26)

⁵ This distinction has no pretense of exhaustiveness. As we have shown, alternative interpretations of types and forms of solidarity abound in the recent literature on this topic.

⁶ See, for instance, the popular slogan "*aiutiamoli a casa loro*" (let's help them in their own countries, i.e., before they decide to migrate), which has been recently used by prominent Italian politicians from different parties like Salvini and Renzi. See on this Garau (2015).

⁷ In French, it is called *Code d'entrée et du séjour des étrangers et du droit d'asile*.

⁸ An example of this is the "flexible solidarity" invoked by the members of the Visegrad Group (V4). See on this Gotev (2016).

⁹ It might also be contended that it is part of "crimmigration", a concept based on the observation of three trends: the tendency of criminal law to expand into migration issues, an obsession with security and the dangerous "other", and the development of an enemy penology (van der Woude and van der Leun 2017, 31).

¹⁰ All the cases focus on the prosecution of individuals acting in their private capacity (rather than as employees of associations) for assisting migrants at the border between Italy and France

and more particularly those migrants who were at some point in Ventimiglia. The cases were chosen on the basis of 1) their representativeness in terms of the law invoked and 2) the fact that many went on appeal and to the highest French courts. The cases were retrieved from the website <https://www.gisti.org/spip.php?article1621> catered by GISTI (“*Groupe d’information et de soutien des immigré·e·s*”), a French association which helps migrants.

¹¹ On the distinction and historical evolution of the notions of fraternity and solidarity in France, see Gianni’s (Chapter 5) contribution to this volume.