Facilitators' Package: Discretion in a Time of Challenge

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Abstract

The provisions of the so called Facilitators' Package require Member States to sanction a wide range of conducts which, having human smuggling at their core, can be broadened up to even include humanitarian assistance. They do so in a very ambiguous way, thus leaving a wide margin of appreciation to the single States in their application. Inside this elbowroom the conditions for the increasing criminalization, within national legislations, of behaviours of facilitation of entry, transit or stay of migrants have been created, making the work of those trying to respond to the needs of refugees more arduous, at constant risk of being equated to human smuggling – and punished as such. The sensitivity of this issue emerges forcefully against the backdrop of the current migration crisis which sees, within an increasingly hostile and militarized context, hundreds of thousands of people waiting at the gates of Europe and ready to cross its borders even without permission. It is used the implementation of the Facilitators' Package as an example to analyse the scope and content of States' discretion in a time of challenge, investigating how this room for manoeuvre can become one of the main elements of States' resistance to the welcoming and integration of refugees and discussing whether limitations to such margin of appreciation may emerge as a first step to respond to the present crisis in a more efficient, yet humane, way.

Resumo

***Facilitators' Package*: Poder Discricionário em Tempo de Desafios**

As disposições contidas no chamado "Facilitators' Package" obrigam os Estados-membros a sancionar um vasto espectro de condutas que, tendo no seu âmago o tráfico humano, pode ser alargado inclusive até à assistência humanitária. Os Estados fazem-no de forma muito ambígua, deixando margem de manobra quanto à aferição da sua aplicação. Perante esta flexibilidade, foram criadas, nas legislações nacionais, as condições para a crescente criminalização de comportamentos de auxílio à entrada, circulação ou permanência de migrantes, o que dificulta o trabalho daqueles que tentam auxiliar os refugiados, tornando esse trabalho perigoso e podendo inclusive ser comparado ao de traficantes humanos e punido enquanto tal. A natureza sensível deste assunto surge obrigatoriamente contra o cenário da atual crise migratória, num contexto cada vez mais hostil e militarizado, no qual centenas de milhares de pessoas estão às portas da Europa e dispostas a atravessar as fronteiras mesmo sem autorização. O caso da implementação do Facilitators' Package *é usado como exemplo para analisar o âmbito e a natureza do emprego do poder discricionário dos Estados numa época desafiante, investigando como esta margem de manobra pode funcionar como um dos principais elementos da resistência dos Estados à receção e integração dos refugiados, discutindo-se se as limitações a esta margem podem atuar como um primeiro passo para responder à atual crise de uma forma mais eficiente, embora humana.*

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Introduction

The past two summers have been filled not only with images of migrants trying to pass land or maritime borders, often risking their lives in the process, but also with the stories of those trying to help them: in most of the cases, they are stories of engagement, passion and generosity; in other cases, though, they also become kafkaesque tales of judicial and bureaucratic hurdles sometimes ending up in a criminal court or in a police cell. From the Austrian citizen arrested after driving two irregular migrants coming from Hungary through the border with Germany (BBC, 2015)[1], to the police charges brought against ten volunteer safeguards operating on the Greek shores (Safadar, 2016), to the crackdown on volunteers in Hungary (Zalan, 2015), to the trial against the former mayor of the French town of Onnion charged for hosting a Kosovan family at his place (Belaich, 2016), the news constantly remind us that the present "immigration crisis", far from only involving third-country nationals fleeing from desperate situations, concerns us all: entries, passages and residences of irregular migrants challenge the human networks of the host countries, calling into question the extent (and very meaning) of European solidarity.

The so called crimes of solidarity (*crimes solidarios*, *délits de solidarité*) locate themselves on the very edgy (and ever busier) border between migration and criminal law[2]: the *extrema ratio*, the certainty and the proportionality principles, which are at the basis of modern criminal law, are by them often called into question, as well as the concepts of excuse, justification and exculpation. Any discussion regarding the possible reform of such crimes within domestic legislation has, therefore, to take such elements into account: where modified, they may expand or restrain the norms' scope and application, either making it more or making it less difficult to prosecute and condemn ordinary citizens supporting irregular migrants in their acts of entry, passage or stay within the borders, in breach of the national provisions on migration. Despite the many differences amongst them, given precisely by the normative peculiarities of each European legislative framework, such crimes can all though be reconnected to a unique source (if not of origin, at least clearly) of inspiration, the European Directive 90/2002 and the Council Framework Decision[3] implementing it: together, they are known as the Facilitators' Package.

This analysis starts from such Package in order to present the main issues related to the structure and scope of the crimes of solidarity – to then move on to analyse

1 For a general overview, see also Gkliati (2016).

2 On the criminalization of migrants, and on the intersection between criminal and migration law, see Parkin (2013).

3 Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

the normative solutions conceived in this field by two as big Western European receiving countries as France and Spain. Despite the many differences with which the Facilitators' Package has been implemented within the two domestic legislations, the core of the provisions related to the *délits de solidarité* is always made of the same substance, the one of discretion; what's more, discretion is actually embedded in the main legislative basis upon which the various national criminal provisions have been constructed. It is therefore through this idea, or rather through a possible rationalization of this idea, that we will try and provide a reading of the national and supranational frameworks related to facilitating behaviours, their scope and their main criticalities in order to, possibly, also to suggest some ways forward.

The Facilitators' Package

When Directive 90/2002 was adopted, Europe had already long been in the midst of the fight against irregular migration – seen as a threat to the peace, stability and prosperity of the Member States: a fear possibly made worse by the shock of the 9/11 attacks and by the subsequent "war on terror"[4]. As clarified by the Preamble, the creation of an area of freedom, security and justice within the European union implied that "irregular migration" had to be reduced or eliminated, and that, therefore, measures should be taken to combat "the aiding of illegal immigration" as well: the purpose of the Directive was precisely to define what "facilitation of illegal immigration" was, and to "approximate existing legal provisions" for what concerned both the criminalized behaviour and the sanctions to be applied to it.
In targeting the aid of illegal immigration as a criminal behaviour in itself, the European Legislators had to have in mind the UN Protocols signed in Palermo just two years before, especially the one related to the phenomenon known as "smuggling"[5]. They also, surely, had to have in mind all the debates and controversies that that Protocol had sparked, precisely related to the difficulty of defining such a liquid, polymorphous and ever-changing matter as smuggling is: transporting one or more migrants through the borders of a State in breach of that States' provision is a

4 See, for instance, Pickering and Ham (2015).

5 The so called Palermo protocols are three protocols adopted by the UN to supplement the Convention against Transnational Organized Crime. They are: United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (so called Trafficking Protocol), New York, 15 November 2000; United Nations, Protocol against the Smuggling of Migrants by Land, Sea and Air (so called Smuggling Protocol), New York, 15 November 2002, and United Nations, Protocol against the Illicit Manufacturing and Trafficking in Firearms, their Parts and Components and Ammunition, 31 May 2001. All the Protocols supplement the United Nations Convention against Transnational Organized Crime, adopted by General Assembly Resolution 55/25 of 15 November 2000.

process that not only calls into question the intentions and goals of the smuggler, but also the ones of the migrant, who can easily find himself in the difficult and vulnerable position of being a law-breacher and a victim at the same time. The ambiguity deriving from the necessity of recognizing States' own jurisdiction and sovereignty over their borders, at the same time protecting the human rights of the smuggled migrants, ran through the whole Smuggling Protocol[6], and was called into question on multiple occasions. Despite this, one significant goal certainly reached by the United Nations (UN) Protocol was precisely the one related to the thorny issue of the crimes of solidarity. In its provision no. 6, in fact, the Protocol establishes that: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and *in order to obtain, directly or indirectly, a financial or other material benefit*": as specified by the *Travaux Preparatoires* (UN, 2000, p. 469), such reference to an element of financial gain is intended to exclude "family members or support groups such as religious or non-governmental organisations" from punishment. In other words, the idea of the UN assembly was to avoid the criminalization or punishment not only of family members that may help irregular migrants to enter, transit or settle for reasons of affection and emotional linkage, but also to shield from prosecution average citizens involved in the assistance and support, for *humanitarian reasons*, of the same migrants. This was, on the other hand, coherent with the very basic principles laying at the foundation of the UN: starting with article 1 of the Universal Declaration, many references to the concepts of humanity and solidarity are found in the body of the UN Conventions, Resolutions and Declarations, all pointing to their relevance in order to ensure the full respect and full protection of human rights[7].

Now, despite the above and despite the fact that the same principles of solidarity and of humanity have also inspired the very foundation of the European Community[8], Directive 90/02, criminalizing the aid and assistance to illegal immigration is,

6 For example: according to the Protocol, smuggled migrants should not be incriminated. But, at the same time, the Protocol leaves it open to the signatory States whether to criminalize irregular immigration within their domestic legislation. See for instance Watson (2015, pp. 7-41).

7 See for instance UN, General Assembly (1999), article 9, paragraph III, lett. C: "Everyone has the right […] To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms". See also article 12: "everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms". (UN, General Assembly, 2005).

8 According to the funding Treaty of the European Union, signed in 1957, the original Member States wanted to: "confirm the solidarity which binds Europe and overseas countries, and

with regards to the conducts of those assisting third country nationals, much more careful in this regard.
More specifically, according to the Directive, Member States should adopt appropriate sanction both on those "who intentionally assist a person […] to enter or transit across the territory of a Member State in breach of the laws of the State concerned" and 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". The conduct incriminated by the Directive is therefore twofold: either assistance in the entry and transit, or assistance in the residence. Yet, the element of financial gain is specifically mentioned only for the second half of the conduct (assistance in the residence), whilst it is not mentioned in the provision related to the first one (entry and transit). Such omission is obviated to in co. II of the same article 1, which provides that "any member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice *for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned*".
Leaving aside the difficulties deriving from the way in which the incriminated behaviour is described[9], the main problem with article 1 of the 90/2002 Directive is that discretion is left to the single Member States as to whether to refrain from imposing sanctions in the case of help with the entry/transit for non-financial purposes: this, in turn, opens a variety of options to the Member States, which first have to decide whether to recur to the criminal toolbox or not. Then, they must also decide whether to only make use of pecuniary sanctions or to resort to detention measures as well, weather to exclude the person helping the third country national from any form of prosecution or, rather, to just prosecute without penalties (Carrera *et al*., 2015, p. 25), and so on.
The consequences of such a normative choice (or, rather, non-choice) have been described in various studies that have analysed the existing state of the crimes of solidarity in Europe[10]: the application of the Directive in the legislative implementation within the Member States is patchy, and it is also opaque. In the first sense, while some States have made use of the exclusion humanitarian clause, some have not; while some introduced it explicitly also for the assistance in the case of resi-

desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations" On the specific situation of Human Rights Defenders see, for instance, Council of Europe (2009).

9 Which, as anticipated, call into question elements of general criminal law that it would not be appropriate to deal with in this paper.

10 Beside the study of Carrera and others cited, see also: Carrera and Guild (2016), Provera (2015), FRA (2014).

dence, some others did not; furthermore while, in some cases, the humanitarian nature of the help provided prevents a trial to be opened (exclusion from prosecution) in some other cases it can just allow for the sanction not to be applied; finally, in the cases where the conduct is criminalized regardless of the intent of the author, sanctions can vary in quality and quantity, ranging from relatively small fines to many years of imprisonment. In the second sense, the data about the numbers of prosecutions, trials, sanctions and acquittals regarding the crimes of solidarity is sometimes missing, sometimes incomplete, sometimes substituted by only anecdotal references. The overall impression is that of a transparent, and yet very heavy ensemble of laces that can tie, in a more or less predictable way, European citizens' supportive behaviour towards third country nationals: there is no certainty of prosecution, nor of condemnation or of sanction, and, yet, their possibility is always present, with the (perhaps pursued) effect of "chilling"[11], such acts of solidarity before they even take place.
The exam of the specific situation of Spain and France should now allow for a more in-depth evaluation of the extension and scope of the problem.

France: General Overview
Starting point for the analysis of the French normative framework regarding the crimes of solidarity is article L622 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA). Such provision, punishing with a fine of 30.000 euros and 5 years imprisonment all those who "directly or indirectly facilitate or try to facilitate the irregular entry, transit and stay of a foreigner in France"[12], comes directly from a decree-act dating back to the 1938 then translated into the 1945 provisions, and has since then always been a part of the French normative framework (Carrere and Baudet, 2004): "in spite of a few exemption clauses, the scope of the law has always been large, and penalties have accrued with time" (Allsopp, 2012, p. xx). When, in 2003, the French legislator had to transpose the provisions of the European directive 90/2002, it did so in a very selective and strict manner: "the law expanded the geographical scope of the article and penalties were again extended. The Government's failure to incorporate the for-profit clause for the sake of efficiency met with renewed opposition, as did its refusal to introduce the recommended exemption clause for those who assist with the aim of bringing humanitarian aid" (Allsopp, 2012, p. 14).

11 More on the "chilling" effect of criminal provisions below.

12 Article L622-1: "Any person who, by direct or indirect assistance, facilitates or attempts to facilitate the illegal entry, movement or residence of a foreigner in France shall be punished by imprisonment for five years and a fine of 30,000 Euros".

Despite the official position of the French Government regarding the existence of the crimes of solidarity being, at least until 2009, that “they do not exist”[13] and that their presence in the French normative framework is “just a myth”, since 2003 the cases of French citizens prosecuted and sentenced on the basis of article L622 CESEDA multiply[14].

The situation becomes so unbearable that, further to a lot of media and public society pressure (Allsopp, 2012), in 2012 a new law is passed, that partially changes the content of article L622 to allow for some exclusion clauses. More specifically, further to the so called *Loi Valles* (from the name of the prime Minister that passed it) the field of family immunities is streamlined, and humanitarian conducts consisting of “providing legal, catering, hospitality or medical services finalized at granting dignified and decent living conditions to the foreigner, as well as any other aid finalized at preserving the his dignity and physical integrity” are no longer prosecuted, “so as to put an end to what has been commonly known as crimes of solidarity”[15].

13 From a letter by the then Ministry for Migration, Eric Besson, sent to the organisations that had signed an appeal against the crime of solidarity in France. See GISTI (2009).

14 Some examples are reported to exemplify how deep can the normative provisions go in pursuing social and even relational bonds between French and third country citizens, in the fight against irregular immigration. In April 2007 a 60 year old woman on a plain complains at the sight of two cushions placed over the mouths of two Malian men being deported on her Air France Flight: she is “removed from the air plane, searched and placed in custody overnight, accused of inciting two undocumented migrants and other passengers to “rebellion with a view to violently resisting people in authority”. On the 18th of March 2008, in France, the Tribunal of the city of Lyon has to consider the situation of a French citizen, in a civil partnership with a third country national (Turkish) in an irregular position. The couple is living together since one year, and is about to get married. The French citizen goes to Turkey to make plans for the wedding and, upon return, she is placed under surveillance, whilst her partner, who has come to the airport to pick her up, is in the meantime arrested. He is further expelled, and she is pursued for facilitation of irregular residence. A similar story is the one related to a couple formed by a French citizen and an Algerian one. Short before the wedding, the third country national is expelled – the partner then travels to Algeria in order to get married and, upon return to France, she is tried for aiding irregular migration. In 2008/2009, Mme Claudine Louis, who is part of a solidarity network, meets a group of Afghans sleeping rough in a park, in Paris. Amongst them there is a minor, aged 16 years, whom she decides to puts up in her flat – she is taken to trial for violation of L622-1. In 2009, February, a volunteer in a migrant support organisation is placed in custody in Calais: the crime, in this case, is to recharge the mobile phones of undocumented migrants. All examples have been collected by GISTI (2017) and are available.

15 From the administrative memorandum of 18th January 2013. See articles 11 and 12 of the *Loi/Law n. 2012-1560*, of 31 December 2012, *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*, *JORF n. 0001* of 1 January, 2013.

The French case is presented (and, indeed, is) as an important victory of public opinion and society with regards to the criminalization of the *délits de solidarité*[16]: certainly, the amendments introduced by the "Valls law" transpose the instances of all the associations operating in the field of protection and assistance to undocumented migrants, and at least in part reduce the severity and stiffness of previously applicable law and regulations. On the other hand, one cannot help but notice that this normative change does not seem to have had a very significant impact on the practice: some very recent decisions of the French courts continue to sentence on the basis of article L622 CESEDA, to the point that, according to one of the most important French associations dealing with migrants the crime of solidarity is not dead (yet)[17]. Before attempting to provide a reading for this setback in the application of the amended law we will now turn to the Spanish case, which presents some interesting similarities with the French one.

Spain: General Overview

In Spain, the facilitation of irregular migration is disciplined by article 318*bis* of the Criminal code. Originally, the provision punished very severely (detention from 4 to 8 years) all those who "directly or indirectly promote, favor, or facilitate the illicit trafficking or clandestine immigration of people from, through or to Spain or other Member States". No mention was made of the possibility of excluding from the application of the provision people assisting or helping migrants for humanitarian purposes – something nevertheless allowed, as seen, by the very broad margin of evaluation left to the member states by the 90/2002 Directive.

Such a provision led to two very different judicial attitudes (Munoz Ruiz, 2016, p. 7). A first, stricter one, applied the provision quite frequently in order to sanction behaviours integrating some kind of help to or facilitation for the irregular migrant. Examples of this first approach can be found in the decisions that sentenced to two years of prison a man and a woman that were trying to smuggle within the Spanish territory a young Moroccan guy that they had met along the way; similarly, a Moroccan citizen who was trying to smuggle his nephew through the border, presenting him as his son, was also sentenced to three years[18].

16 See for instance Allsopp (2012), Sigona (2016).

17 The Groupe d'information et de soutien des immigrés (GISTI). See for instance the case of Rob Lawrie, charged with the crime of aiding irregular migration for driving an Afghan girl from France to the UK in January 2016, in Baumard (2016). See also the case of a French citizen sentenced for assisting two irregular migrants to reach Antibes railway station in LDH Toulon (2015). Finally, see the case of the ancient mayor of the city of Onnion, see Belaich (2016).

18 According to this same approach, the conduct of article 318bis of the Spanish criminal code would not only be breached in case of help to a clandestine entry, but also in case of an entry with irregular documents. See, for instance: *Sentencia de la Audiencia Provincial de Málaga*

Another, more lenient approach, makes a sparser application of the provision – grounding its softer approach in a careful application of the principles of proportionality and legality: according to this reading, article 318*bis* of the Criminal code would only be called into question in case of danger or breach for the individual rights of the foreigners. When, on the other hand, "the behaviour only presents a threat or a danger against the regulation of migration fluxes, and there is no danger of breach of the rights of the migrant, there is no need and no reason to apply the criminal sanction": following this approach, the Supreme Tribunal refused for instance to condemn two Guatemalan citizens, brother and sisters, who were hosting and assisting in the search for a job some irregular compatriots, without any financial gain[19].

This softer judicial approach came under close scrutiny in 2015, when talks at a parliamentary level were started regarding a possible reform of the 318*bis* provision: one of the main topic of discussion was whether a specific clause exempting from prosecution those who were providing humanitarian aid to the irregular migrants should be introduced or if, on the contrary, the possibility of refraining from prosecution in the case of humanitarian assistance should be left to the discretion of the public prosecutor[20]. Civil society mobilized[21], particularly in the southern part of the country which, for geographical reason, is more interested to the phenomenon of irregular arrivals and, further to the pressure of public opinion, the original project of law was amended: the present provision does now allow for an exemption of prosecution in the case of humanitarian assistance, to be applied in any case and regardless of the intervention of the public prosecutor[22].

15/2004, [JUR 2004\121926] and *Sentencia de la Audiencia Provincial de Málaga 10/2005, [JUR 2005\84742]*

19 *Tribunal Supremo, n. 1378 14 December 2011 [Repertorio de Jurisprudencia 2012\453]; Tribunal Supremo, n. 212 9 March 2012 [Repertorio de Jurisprudencia 2012\4642]; Tribunal Supremo, n. 446 28 Mary 2012 [Repertorio de Jurisprudencia 2012\6563].*

20 *Anteproyecto de ley orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal* [Draft proposal to amend the Criminal Code]: "Any person who intentionally helps a person who is not a national of a Member State of the European Union to enter the territory of another Member State or to transit through it in breach of the law of that State on the entry or transit of foreigners shall be punished with a fine of three to twelve months or imprisonment of six months to two years. The Public Prosecutor may refrain from accusing for this offense when the objective pursued is solely to provide humanitarian aid to the person concerned. If the facts were committed for profit, the penalty will be imposed in its upper half".

21 Salvemos la hospitalidad (2013).

22 *Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, articulo 318bis*: "Any person who intentionally helps a person who is not a national of a Member State of the European Union to enter or transit through Spanish territory

It is still early to consider whether this change in the law has been already implemented in the practice, but a very recent decision[23] taken by the Supreme Tribunal seems to follow the Legislator's lead: considering the case of a woman assisting her compatriots in traveling to Spain, offering them hospitality and helping them to find a job, the Tribunal came to the decision of condemning her for breach of (new) article 318*bis* Criminal code on the basis that, in order to support the third country nationals in finding an occupation, she had also recurred to falsified job contracts or job offers, asking her "clients" for money in return for her services. The element of financial gain (and even of exploitation, it seems) was so evident and clear that, as anticipated, the Tribunal could not but find the covenant guilty. At the same time, though, the Supreme Judges dedicate sometime to analyze the new amendments of article 318*bis* Criminal Code: since, they find, the new criminal provision "is much more benevolent [than the previous one] and explicitly excludes [from prosecution] the cases of humanitarian aid", only very serious conducts that facilitate entry or stay in breach of the normative provisions can be sanctioned. Therefore, according to the Judges, the fact of hosting irregular migrants, or even of helping them looking for a job or getting a residence permit would not (anymore) constitute *per se* a breach of the (new) law, and would therefore go unpunished – as said, what in this case made the balance oscillate in favor of a condemnation was the fact that the convicted lady was not only faking official documents, but also asking to be paid for the trouble.

France and Spain Before the Aid to Irregular Migration

The Spanish and French experiences with regards to the handling of the so called crimes of solidarity present some interesting elements in common, that justify their compared analysis. First of all, as seen, both countries had provisions in place against the phenomenon that pre-dated the passing of the European directive no 90/2002; furthermore, the mere entry into force of the Directive did not push either of them to amend or change their legal norms in any way, especially not in the sense of implementing the possibility of introducing the humanitarian justification clause provided by article 1.2 of the Directive itself. As a consequence, there were, in both countries, cases of prosecution and of conviction for the crimes provided by article L622 CESEDA and 318*bis* Criminal Code. Such episodes in turn sparked a reaction in the public opinion and in the media, which pushed for a reform of the domestic

in a way that violates the law on the entry or transit of aliens shall be punished with a penalty of a fine of three to twelve months or imprisonment of three months to one year. *The facts will not be punishable when the objective pursued by the author is only to provide humanitarian aid to the person in question"* (italics added).

23 Tribunal Supremo 2908/2016.

framework allowing for the humanitarian justification clauses to be introduced, in France in 2012 and in Spain in 2015.

These developments can be explained through the reading suggested by those maintaining that, against the general indifference and even hostility that seems nowadays to surround the migratory phenomenon, civil society still has an important role to play (to the point of even getting to change the law) in order to build solidarity and support towards third country nationals entering and living within the State members (Allsopp, 2012; Sigona, 2016). Yet, as anticipated, the commitment and passionate involvement of civil society, and even legislative reforms, have not been enough to avoid, even recently, prosecutions and convictions of aiding behaviours, especially in France. To try and explain this, we will now turn to the issue that lays at basis of the crimes of solidarity, both at a national and at a supranational level: the problem of discretion.

Shaping Discretion

According to D. J. Gallighan (1990, p. 23), "discretionary power is based around […] two variables: the scope for assessment and judgment left open to the decision-maker by the terms of his authority, and the surrounding attitudes of officials as to how the issues arising are to be resolved". The first element of the definition, related to the decision-maker's own margin of manoeuvre, focuses the attention on how bureaucratic thinking and problem solving interacts with rules. The second element, related to the interaction between powers, enlightens the complex balance of prerogatives and competences that is at the basis of any exercise of administrative discretion. Such a definition, relying as it does on the ideas of "progression" and dynamism, is very useful to our purposes: by so doing, in fact, on the one hand it avoids the dichotomy, often present within the legal thinking, between rules and their absence, allowing to see that discretion is actually present and operating *within* the rules themselves – what can vary is its intensity, which in turn depends on the structure of the norm and on the use made of it by the decision maker. On the other hand, such definition clarifies how discretion cannot be conceived as something completely autonomous and auto-referential, but rather as something dynamic, depending on the interaction with the different powers of the State, the judicial one in particular.

If the above definition is applied to the issue of the way crimes of solidarity are shaped and dealt with in Spain and France, some interesting reflections develop. For what concerns the first element of the definition, and namely the way in which the norm is built and the way in which the decision maker relates to it, the experiences of the two countries seem to overlap quite easily: in both cases the definition of the crime is very vague, characterized by a number of technical hurdles and therefore allowing the single decision maker (the police officer, mainly) for a very

significant margin of maneuver. This is, *per se,* neither a good nor a bad thing: aside from the fact that the social sciences have shown that discretion is in reality much more codified and structured than what it was generally believed (Hawkins and Feldman, 1992), the natural diffidence of a lawyer *vis a vis* discretion needs to be overcome by the consideration that discretion is essential to the functioning of the modern State, and that the French Revolution ideal of a perfect law codifying every aspect of reality is nothing but a (perhaps even dangerous) illusion. The moment discretion becomes an issue, though, is when it brings the single decision maker to make choices that are in *contradiction* with the goal and scope of the normative provisions that he should apply: as seen in the French case, for instance, reviving or re-expanding the scope of incrimination clauses that should have been reformed or even suppressed.

The second element of the definition, and namely the interaction between the decision makers' margin of *maneuver*, on the one hand, and the other powers of the State – particularly the judiciary, on the other, comes then into question: in a democracy, in fact, the discretionary power of the single street-level bureaucrat is just as broad as the judiciary powers allows it to be. It is on the judiciary that impends the responsibility of checking that the use of discretion is not misdirected or misguided: the less pervasive the control, the wider the discretion, and, possibly, also the abuse.

It is here that the French and the Spanish experiences seem to start differentiating from one another: whilst in Spain, as seen, there had always been, long before talks over a possible reform of the article were started, a very reputed and highly respected interpretation of the previous article 318*bis* Criminal Code that tended to reduce its application, consequently allowing for a wider scope of the (then still not codified) humanitarian clause, the standing of the French judges has always been in this respect much stricter[24]. This difference of jurisprudential approach can also explain why, despite the very many similarities, the French and the Spanish cases seem finally to diverge when it comes down to the real application of the humanitarian clause introduced through a lot of grass-root work and advocacy: the intervention of the civil society, and even the legislative reform themselves, may not be the final solution to the problem of the crimes of solidarity because, at the roots of such provisions, is the discretion of the single bureaucrat, who enjoys a wide margin of appreciation given the very blurry nature of these norms. What can make the difference, according to the definition of discretion that we are using here, is instead only the intervention of the judiciary power, to which the onus is entrusted to verify that, in the exercise of such discretion, the decision maker does not contravene to the goal and spirit of the norms he needs to apply.

24 Despite the important suggestions coming from the French Constitutional Court, see: decision n. 96-377 DC, JO, 23 July 1996.

In light of the above, then, whilst some hope for a restriction of the application of the *délits de solidarité* seem to be in order in Spain, much less sure seems to be the real impact and outcome of the 2012 French legislative reform: in the absence of a different approach on the part of the judiciary, the single decision maker's discretion could always void the new humanitarian clauses of any real efficacy.
The fate of the *délits de solidarité* seems therefore to still be far from certain. Whether there is any indication in this respect that can come from the broader European Framework is what we will try to ascertain now.

The European Way to Discretion

If read through the first element of our operational definition, namely the structure of the norm, the Facilitators' Package stands out as the embodiment of discretion *within* the law: the definition of the conduct is so broad, so vague and so undetermined as to the pursued scopes of the provision that, as also confirmed in the two examples carried out in this paper, the margin of maneuver for the single decision maker (in this case the Member States) is extremely broad. This has led to a double, and somehow contrasting result: on the one hand, the application of the Directive is by all standards unsatisfactory because patchy, opaque and ineffective. On the other hand, though, volunteers all over Europe feel uncomfortable carrying out their task, as they fear that the vague, and yet impending criminal axe may strike them at any given moment. The Directive may not be effective enough to contrast smuggling – but it is very effective in hindering solidarity.
The second element of the definition should now allow us to investigate whether the elbowroom of the Member States is counterbalanced by the European Judges, in particular by the Judges of the European Court of Human Rights (ECHR): if, in other words, a guidance is somehow provided so as to limit such discretion thus increasing the effectiveness of the Directive that provides for it.
Strasbourg has not had many chances to consider the application of the crimes of solidarity: the only opportunity came in 2011[25], when the Court had to consider the case of a Moroccan citizen who, in France, had hosted in his house his son – in – law, who had remained in the country in order to assist his wife (the claimant's daughter) during a difficult pregnancy. The Moroccan citizen had been sentenced for aiding illegal migration – the judges had, though, recognized that his behaviour came out of generosity and had therefore decided not to apply any sanction.
The European Judges had two issues to address: the first one was to decide whether there was a family life worth protecting[26], the second was whether the intervention

25 ECHR, n. 29681/08, Mallah c. France.

26 Given the fact that the judgement turned around the previous version of article 622 CESEDA, which did not mention, amongst the family relations that could give rise to an exception in the application of the provision, the one between son and father in law.

was necessary and proportionate according to the criteria established in article 8 ECHR.
The Court found in favour of the Government, considering that not only was the provision of article L622 necessary to counter illegal migration, but that it was also proportionate, *i.e.* respecting the balance between the goal pursued and the interference in the private sphere of the applicant. The reason for this finding laid on the fact that the claimant, even if sentenced, had not been subject to any kind of punishment: therefore, the interference of the French state in his personal sphere did not seem excessive to the Judges[27].
Yet, is precisely on this front that the Court's decision seems very self-restrained, and even in contradiction with other decisions revolving around the same aspect[28]. The problem here is that the Court deliberately avoided to address the "chilling" effect that sanctions (even if not applied) or, before them, criminal proceedings can have on the individuals: such effects, which range from shame to insecurity, uncertainty and sometimes fear, can be produced by the sheer fact of having to do with criminal forces such as the police, of being interrogated, of having one's house searched, and so forth. They can even spring from the mere fact of knowing that the criminal provision is there, waiting to be used, even though nothing has happened yet.
By refusing to address this aspect – which is on the other hand crucial when it comes down to the crimes of solidarity as they mainly rely on the deterrent or dissuasive aspect of the criminal provision precisely to "chill" any attempt to support or to aid irregular migration – the Strasbourg Court has thus refrained from intervening on the contested and controversial issue of whether State's total discretion on the application or non-application of a humanitarian exclusionary clause can

27 The decision, though, was not taken lightly. See, in this respect, the dissenting opinion of Judge Power Forde.

28 On the "chilling effect" that provisions criminalising homosexuality can have on private life, regardless the fact they are or are not applied, see for instance ECHR, Dudgeon v. United Kingdom, Series A, n. 45: "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 (1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life either he respects the law and refrains from engaging (even in private with consenting male partners) in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution". See also, ECHR, n. 27520/07, Altug Taner Akcam v. Turkey, for the same considerations re provisions restricting and criminalising freedom of expression: "The Court further notes the chilling effect that the fear of sanction has on the exercise of freedom of expression, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future".

really be considered compatible with the protection not only of the life and integrity of irregular migrants, but also with the preservation of solidarity networks between European citizens. Self-restraining itself in such a politically charged field, the Court seems to have missed an opportunity to reshape the discretion at the basis of the European Directive, and therefore of the national legislation, in a form more compatible with human rights.

Ways Forward

Already at the end of the 1990s, whilst analyzing the contents of the Treaty of Amsterdam, scholars were noticing that the original EU approach – the one of reducing State's discretion in order to increase the privates' one (under the coherent control of the EU) seemed to have somehow weakened when addressing the rights of third country nationals. The existence of a link between clearance and coherence of the EU's body of law (and jurisprudence) on the one hand, and individuals' freedom on the other was therefore suggested (Guild, 1998, pp. 613-625)[29]. In other words, so long as the normative framework at a European level was strong, this, at least in the field of freedom of movement and migration, would often correspond to an improvement in the enjoyment of these rights on the part of the individuals. When, on the other hand, States regain some margin of maneuver, this could have a significant impact on individual situations. The closing of the article was somehow prophetical: the bones which the new structure of the rights of third country nationals was built upon were quite fragile, and the meat that would be put on them would determine the real extent of the rights that the third country nationals would be able to enjoy (Guild, 1998, p. 618). There is no better example of how fitting that warning was, then to look at the legal framework now related to the "facilitation of unauthorized entry, transit and residence": the broad discretion left open to the decision makers has led to a vague and opaque system of sanctions and

29 "Giving the EU competence, combined with the pressure of coherence, results in the exclusion of national discretion in the treatment of persons within the scope of Community law [...]. This means that as the member states gave exclusive responsibility to the Community to regulate intra-Union movement of nationals of the member states, they lost, individually, the right to control that movement […] Differing perspectives on the role of national discretion have informed and moulded the Union debate regarding third country nationals […] The first step of the Union over movement of third country nationals – the abolition of internal borders – exhibited the classic characteristics of Community law in respect of persons – competence to the Community, coherence through the creation of rights and the concomitant exclusion of national discretion. In the ten years between the Single European Act and the Amsterdam Treaty that foundation which would have brought Europe's third country nationals within the same framework of an ever closer Union of the peoples of Europe was abandoned in an orgy of national discretion." (Guild, 1998, pp. 613-625).

stigma that involves not only third country nationals, but European citizens as well.
Two possible ways to counter this state of things could be suggested: either reshape the relationship of the decision makers with the norms, or to increase the responsiveness of other State's actors towards the single decision maker's exercise of discretion. In the first sense, the norms should be reformed so as to make them clearer, for instance specifying the main interest that should be protected by the offense or making the use of the humanitarian exemption clause mandatory for everyone (Carrera, *et al.*, 2015, p. 64). Other solutions that have been suggested, such as the one of "obliging Member States to put in place adequate systems to monitor and independently evaluate the enforcement of the Facilitators' Package" (Carrera, *et al.*, 2015, p.11), impinge already on the second element of our operational definition, advocating, as they do, for the use of external and impersonal factors (a monitoring system) so as to counterbalance the discretion of the decision makers (both individuals and States).
This suggestion could, though, be maybe brought a little further: the best controlling factor, for the use and extension of a norm that targets human relationships, is precisely the human factor. In other words, it is also by placing more trust (and more responsibility, as well) upon the other actors playing on the field of crimes of solidarity that the discretionary, and sometimes arbitrary application of provisions incriminating simple behaviours of help and assistance towards migrants can be countered. Important proof has in this sense been already given by the civil society, and sometimes even by the national legislators. It is from the judges, both at a national and at a European level, that a clear and strong answer is now awaited.

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