« Offense of solidarity » in France
Understanding the legal context

I. The offense and its exemptions

A person accused of the offense which has become known as «offense of solidarity» is usually to be prosecuted under Article L. 622-1 of the Code of Entry and Residence of Foreigners and the Right of Asylum (CESEDA).

According to this article, a person who has « *assisted or attempted to assist in any direct or indirect manner the unauthorised entry, circulation or residence of a Foreigner in France* » shall be charged with a maximum of five years of imprisonment and a 30 000 Euros fine. Both charges can be cumulative. This represents the maximum sentence; the court can impose any lesser sentence, including a suspended sentence. The court can also find the person guilty, without giving any penalty.

The court can also of course release the prosecuted person, if it considers that the offense has not been committed or that the person must benefit from the exemptions provided by the law : Article L. 622-1 states that these acts are penally sanctioned « *subject to the exemptions provided by Article L. 622-4*». These «exemptions» are supposed to protect from all prosecutions those who provide a selfless help to Foreigners.

This Article L. 622-4 has been modified by the December 31, 2012 law « *relative to holding in custody for verification of the right to residence and modifying the offense regarding assisting unauthorised residence, to exclude humanitarian and selfless acts* ». But, contrary to what implies the title of the law, this article still does not provide enough protection against the prosecution of « humanitarian and selfless » acts (selfless understood as « without reward or compensation »). In many cases these definitions can be used to intimidate or discourage a person with an entirely altruistic goal.

Firstly, because the exemptions provided in the article only apply to the offense regarding the assistance to the «unauthorised residence» of an undocumented migrant, and therefore do not apply to the facilitation of unauthorised entry or transit. Even if a person does it in a selfless manner and without receiving any compensation, said person can be prosecuted and charged if they helped a foreigner cross the border or even only helped them to go from point A to point B on the French territory (for instance, driving them in their own car).

Legal precedents and practical cases

As regard of facilitation of transit

Facilitation of transit, provided selflessly, can sometimes benefit from the exemptions provided for the facilitation of residence, in particular when they are indissociable. This is how Nice Criminal Court ruled on January 6,

2017, by acquitting Pierre-Alain Mannoni, yet prosecuted, both and distinctly, for facilitating the residence and facilitating the transit :

«… *to provide the desired help, consisting in offering housing for one night in a flat with all modern conveniences to three young women exhausted by harsh conditions of living, Pierre-Alain Mannoni was forced to convey them, to bring them from Saint-Dalmas-de-Tende to Nice, his place of residence, situated 70km from the departure place . From then on, one is obliged to recognize that the transit of the three migrant women organized by the defendant was only the necessary prequisite for the facilitation of transit, covered by the immunity provided by Article L. 622-4 for the above mentioned reasons.* »

As regards the facilitation of unauthorised entry

It could be interesting to uphold that no legal proceedings – and *a fortiori* no conviction –should be possible each time it comes to help exiles to enter France to request asylum. Because, following the Geneva Convention, entry on the national territory for the purpose of obtaining international protection cannot, in any case, be considered as unauthorised, since the absence of documents normally required cannot be opposed to an asylum seeker. Thus, since in this case the entry in France cannot be considered as unauthorised, one of the constitutive elements of the offence is lacking. The principle of strict interpretation of the criminal law should be an obstacle to the prosecution (art. 111-4 of the Criminal Code).

Secondly, even for helping an undocumented migrant illegally «reside», the only part of the offense to which exemptions can apply, exemptions are limited.

The following persons, belonging to the family of the assisted foreign national, benefit from immunity - and therefore will not, in theory, be prosecuted – (CESEDA, Art. L. 622-4, 1° and 2°) :
- his or her parents or grandparents, children or grandchildren, spouse, brothers and sisters and their spouses ;
- his ot her spouse or any person with whom the Foreigner lives in a « marital situation », as well as the parents, children, brothers or sisters of the spouse or the person with whom the foreign national lives.

These exemptions are fairly simple. However, it is more complicated for a person who is not a relative of the assisted foreign national and thus is not part of his or her family.

Indeed, any person (who is not a relative) « *whose alleged act was not met with any direct or indirect compensation and which consisted of giving legal advice, providing food, lodging or medical care which can improve foreigners' life conditions, or any assistance which helps them preserve their dignity and physical integrity* » benefits from exemption (CESEDA, Art. L. 622-4, 3°).

Hence, to avoid prosecution, BOTH of the two following conditions HAVE to be met (if one of them is not met, the offender may be prosecuted) :

1° The helper must not receive any « direct or indirect » compensation. Since the article does not give any specification on the nature of said compensation, some situations can lead to uncertainties on the subject, but the existence of such compensations has to be proven for the Court to charge any sentence.

Legal precedents and practical cases

a) There was an attempt of prosecution on the grounds that the person who had been helped had « given a hand » to the helper by way of thanks or as trade off. Thus a person was prosecuted by Perpignan Criminal Court in July 2015 – but the Prosecutor dropped the charges at the hearing – for having given shelter during two years to a family which « *participated in the household duties (cooking, housekeeping etc.)* ».

b) The Court of Cassation seems to admit that providing proof of residence to people with unauthorised residence can be covered by the immunity provided by article L. 622-4 3° if there was no counterpart (even so it is not a case, *sensu proprio*, of legal advice, even less of catering or housing services or medical treatment, and it is difficult to uphold that providing these proofs of residence aimed to preserve the dignity or the physical integrity of the persons to whom they were given). The Court indeed has quashed a ruling of Reims Court of Appeal which had condemned the person who had provided these proofs « *without giving any explanation on the circumstances under which Mr X had taken in fellow countrymen in irregular situation and has provided them with proofs of residence, particularly wether there was or not a direct or indirect counterpart* » (Cass. Crim. March 4, 2015 n° 13-87185). Certainly, this cassation is principally here to sanction the inadequacy of the motivation of the Court of Appeal ruling, but one can deduct that, according to the Court of Cassation, a sentence could only be pronounced if a counterpart had been expressly recorded.

2° Even if the assistance was given without any compensation, it still has to meet certain
conditions.

a) If it is a legal advice, then no further condition is to be satisfied.
b) If it is food provision, lodging services, or medical care, these services must then be provided in the intention to « *ensure decent and dignified living condition for the migrant* ».
c) If it is any other form of assistance, then it must be intended to « *uphold the dignity and physical integrity* » of the assisted person.

Any form of assistance that does not match the criteria mentioned above – in a) or b) - is thus punishable if its aim is not to uphold the assisted person’s dignity or physical integrity. But this condition is difficult to meet : for example teaching someone how to read, or charging their cell phone are not considered as acts to uphold this person’s dignity or physical integrity and therefore these forms of

assistance – and many others - can be punished by the law even if those acts are selfless and there is no compensation or reward.

All these restrictions to the immunity helpers should benefit from, without any discussion, lead to the possibility of prosecution. That said, the court has the final authority over analysing and deliberating on the facts, deciding if the person charged is guilty or not. The charges can be different from the ones requested by the Prosecutor, who has decided to charge someone subject to a police investigation. In that case, the court can decide to acquit, against the prosecutor's recommendation. But even in a case of discharge, or if the charges are dropped (or even if the prosecutor closes the police investigation with no further action), the people concerned will nonetheless have harshly suffered the direct and indirect consequences of a criminal investigation and in some cases may have had to appear in front of a court.

II. Is this legislation compatible with European texts?

The Constitutional Court has previously several times ratified the measures criminalising the facilitation of unauthorised entry and residence, even when the law restricted much more strictly the exemptions that could be granted to people who acted for humanitarian purposes (cf decisions 96-377 DC July 16, 1996, 98-399 DC May 5, 1998 and 2004-492 DC March 2, 2004).

A Nov 28, 2002 European Directive 2002/90 defining the « *facilitation of unauthorised entry, transit and residence* »[1] states that each Member State shall adopt appropriate sanctions on :
a) 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 ;
b) 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.

This directive therefore distinguishes between on the one hand the facilitation of illegal entry and transit (which can both be punished in any case, even if the helper does it with a non-lucrative purpose) and on the other hand the assistance to residence, which is indictable by Member States only if it is carried out for a profit-making purpose, meaning the helper was seeking a retribution as a counterpart of the help provided. The French legislation goes way beyond the Directive: people can be prosecuted for various forms of assistance to foreigners without a profit-making purpose (see above).

Thus, when ignoring the « profit-making purpose » criterion, which is the key element of this directive, it is clear that the French government adopts a much broader definition of the facilitation of unauthorised residence than the one adopted by the EU. Admittedly, the goal of this directive is only to impose an obligation on EU member states to put in place a system of penalties for

1 http://eur-lex.europa.eu/legal-content/fr/ALL/?uri=CELEX%3A32002L0090

facilitating unauthorised entry and residence, without imposing a precise set of rules on this regime of sanctions. However some elements allow to think that the regime adopted into the French legislation goes against EU legislation, because :

- Firstly, the directive itself requires EU member states to establish «appropriate» sanctions: while the directive deems it unnecessary to criminalise the facilitation of unauthorised residence for non-lucrative purposes, such prosecution in internal law can thus seem inappropriate, contrary to the goal of the directive itself and , more generally, to the requirement of necessity and proportionality of the sanctions.

- Secondly, because it is stated in article 1 parag. 2 that a State can decide not to penalize the act of facilitating illegal entry «for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned». This provision emphasises the fact that, under EU legislation, it should be impossible to penalise and prosecute the act of facilitating “unlawful residence” without lucrative goal. In other terms, it is absolutely not necessary to provide for a clause of immunity for facilitating unauthorised residence since non-lucrative help must not be incriminated, contrary to the assistance to entry without lucrative goal.

- Finally, article 27 of the the Convention implementing the Schengen Agreement (which refers to illegal immigration networks) does not distinguish between facilitating entry and facilitating residence, and requires lucrative purposes in both cases for penalisation: « *The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an undocumented migrant to unlawfully enter or reside within the territory of one of the Contracting Parties in breach of the domestic laws of the Contracting Party in respect to entry and residence of illegal migrants.* » French domestic law seems to go, once more, against the logic of European legislation.

III- What is the impact of the decriminalization of unauthorized residence on the penalization of facilitating unlawful residence?

The french law n° 2012-1560 passed on December 3, 2012 repealed the offense of « unauthorized residence ». Thus one can wonder to what extent persons can still be prosecuted if they do help a foreigner reside on the territory, while this foreigner is not committing any violation of the law when staying illegally in the country. If the original offense no longer exists, how come there are still penalties in effect for facilitating unlawful residence ?

In reality, the impact of decriminalization of unauthorized residence would be obvious if the helper/facilitator was prosecuted solely as the foreigner’s accomplice. An accomplice can be prosecuted only if their association with the foreigner facilitate an act which is itself punishable.

It is however different for facilitating unauthorized residence, precisely because the helper is not prosecuted as an accomplice but as having committed an

autonomous offense.
This offense - facilitating unauthorized residence - is established once the main elements constituting it are present. If the person that is helped is, according to the legislation regarding the residence, in an irregular situation – even if that person cannot be prosecuted – it is sufficient for the helpers to be, themselves, prosecuted for helping the foreigner.

It is different if the person is in one of the cases of exemption provided by the law. But these cases being, as we have seen, yet too much limited, the helpers are often punishable, in spite of the decriminalization of unauthorized residence.